

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

File No. 18-cv-1776
(JRT-HB)

St. Paul, Minnesota
January 31, 2022
1:00 p.m.

BEFORE THE HONORABLE HILDY BOWBEER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(CASE MANAGEMENT CONFERENCE VIA ZOOM)

Proceedings recorded by mechanical stenography;
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P R O C E E D I N G S

IN OPEN COURT

(Via Zoom)

THE COURT: We are gathered by Zoom for a case management conference -- there's somebody else -- in the In Re: Pork Antitrust Litigation. This is proceeding under Matter Number 18-cv-1776.

Now, I will tell you that because our courthouse is closed, I'm -- because of the trial -- the federal civil rights trial associated with the George Floyd death, I'm working from home, and that means that all of you are crowded on a very small laptop screen. Once I get appearances, I will do what I can to declutter the screen, but if I don't see somebody, that's why. In fact, there's so many of you, you're on two laptop screens, but I only have one laptop.

In any event, what I want to do first is take -- take roll, if you will. I'm going to work from the list that we got of people who told us by midmorning that you were attending and wanted to have your appearance noted. If I don't call on you, it's because I didn't hear that you were going to be attending. But we'll see if we can get everybody listed who wants their appearance noted.

Let's start with the class plaintiffs and start among the class plaintiffs with the direct purchaser

1 plaintiffs. I have Bobby Pouya.

2 MR. POUYA: Present, Your Honor.

3 THE COURT: Brian Clark.

4 MR. CLARK: Good afternoon.

5 THE COURT: Clifford Pearson.

6 MR. CLIFFORD PEARSON: Good afternoon, Your Honor.

7 THE COURT: Joseph Bourne.

8 MR. BOURNE: Good afternoon, Your Honor.

9 THE COURT: Michael Pearson.

10 MR. MICHAEL PEARSON: Good afternoon, Your Honor.

11 THE COURT: Joseph Bruckner.

12 MR. BRUCKNER: Yes, Your Honor. Good afternoon.

13 THE COURT: Now I don't have anyone else, at least
14 on my list, who had identified themselves as wanting to
15 attend and make an appearance for the direct purchaser
16 plaintiffs, but is there anyone else who does?

17 MR. BRUCKNER: Your Honor, I think you've got the
18 whole list.

19 THE COURT: All right. Thank you.

20 Let's go now to the consumer indirect purchaser
21 plaintiffs. I've got Breanna Van Engelen.

22 MS. VAN ENGELEN: Good afternoon, Your Honor.

23 THE COURT: Daniel Hedlund.

24 MR. HEDLUND: Judge.

25 THE COURT: Joshua Rissman.

1 MR. RISSMAN: Good afternoon, Your Honor.

2 THE COURT: And Shana Scarlett.

3 MS. SCARLETT: Good afternoon, Your Honor.

4 THE COURT: That's everyone that I knew of who
5 wanted their appearance noted for the consumer indirect
6 purchaser plaintiffs. Am I missing anyone?

7 No. All right.

8 Moving on to the commercial and institutional
9 indirect purchaser plaintiffs. I don't know that I have
10 anybody who told me, at least by the time we put the list
11 together, that you wanted your appearance noted, but I bet
12 you there's somebody out there. So who's going to take the
13 lead for the commercial and institutional indirect purchaser
14 plaintiffs this afternoon?

15 MR. FINLEY: Good afternoon, Your Honor. Blaine
16 Finley of Cuneo, Gilbert & LaDuca on behalf of the
17 commercial and institutional indirect purchaser plaintiffs,
18 and I apologize for not e-mailing with my appearance ahead
19 of time.

20 THE COURT: Thank you. I've got you now. And is
21 there anybody else that you know of who was planning to make
22 an appearance for your group of class members?

23 MR. FINLEY: I believe not, Your Honor, and I
24 don't see anyone on this call currently.

25 THE COURT: All right. That then moves us to the

1 direct action plaintiffs. First on behalf of the
2 Commonwealth of Puerto Rico, I don't know that I got an
3 e-mail, but I did notice Kyle Bates in the waiting room.
4 Are you on, Mr. Bates?

5 MR. BATES: I am. Good morning, Your Honor.

6 THE COURT: And are you anticipating anyone else
7 appearing on behalf of the Commonwealth of Puerto Rico?

8 MR. BATES: I am not, Your Honor. Thank you.

9 THE COURT: Moving to the Winn-Dixie -- to
10 Winn-Dixie and Bi-Lo Holdings. Again, I don't think I got
11 an e-mail, but I did notice Patrick Ahern in the waiting
12 room. Are you on?

13 MR. AHERN: I'm on, Your Honor. Thank you.

14 THE COURT: All right. And are you expecting
15 anyone else on behalf of Winn-Dixie and Bi-Lo Holdings?

16 MR. AHERN: I am not.

17 THE COURT: Moving on to more recent direct action
18 plaintiffs. There's a group of direct action plaintiffs
19 that is commonly represented with Dollar General. I -- I
20 believe I understood -- or got an e-mail ahead of time that
21 Alberto Rodriguez would be appearing. Are you on?

22 MR. RODRIGUEZ: I am, Your Honor. Good afternoon.

23 THE COURT: Good afternoon. And Christina Rae
24 Burgart Lopez.

25 MS. LOPEZ: Yes, Your Honor. Good afternoon.

1 THE COURT: David Germaine?

2 MR. RODRIGUEZ: Mr. Germaine may not be on,
3 Your Honor.

4 THE COURT: So we don't have Mr. Germaine at least
5 at this point. And then I also got an e-mail from Phillip
6 Cramer, although I'm not sure I have seen him having been --
7 you know, kind of made his appearance on CM/ECF, but is he
8 on the hearing this afternoon?

9 MS. LOPEZ: I don't believe he's joining either.

10 THE COURT: All right. Does he intend to enter an
11 appearance? If not for this afternoon, is he intending to
12 enter an appearance on behalf of the -- of this particular
13 group of direct action plaintiffs on the docket?

14 MS. LOPEZ: Yes, Your Honor. And I believe the
15 ECF paperwork just went through, so we'll make sure to get
16 that entered.

17 THE COURT: Okay. Very well. Is there anybody
18 else who wanted an appearance noted for the group of direct
19 action plaintiffs that is commonly represented with Dollar
20 General?

21 All right. Moving on, there's a group of direct
22 action plaintiffs that's commonly represented with Cheney
23 Brothers. I don't know that I got an e-mail from any of
24 them, or, if I did, I missed it. Who'd like to have their
25 appearance noted for the group of Cheney Brothers direct

1 action plaintiffs?

2 MS. GORE: Good afternoon, Your Honor. Kristin
3 Gore from Carlton Fields.

4 THE COURT: All right. And are you expecting
5 anyone else on behalf of that particular group of direct
6 action plaintiffs?

7 MS. GORE: I do not believe so, Your Honor.
8 That's it. Thank you.

9 THE COURT: And we've got a group of direct action
10 plaintiffs that is commonly represented with Kroger.
11 Michael Ponzoli.

12 MR. PONZOLI: Good afternoon, Your Honor.

13 THE COURT: Samuel Randall.

14 MR. RANDALL: Good afternoon, Your Honor.

15 THE COURT: And William -- is it Blechman?

16 MR. PONZOLI: Your Honor, I think Mr. Blechman had
17 a conflict that came up late and could not attend.

18 THE COURT: All right. Is there anybody else who
19 is appearing this afternoon on behalf of the group of direct
20 action plaintiffs that are represented along with Kroger?

21 MR. PONZOLI: No, Your Honor.

22 THE COURT: Next there's a group that is in common
23 representation with Topco. I've got Matthew McCahill.

24 MR. MCCAILL: Yes, Your Honor. That's Matt
25 McCahill from Kaplan Fox for the Action Meat plaintiffs,

1 Giant Eagle, and UniPro Foodservice, Inc.

2 THE COURT: And, actually, I'm trying to come up
3 with a -- sort of a moniker for each group of direct action
4 plaintiffs. Would you rather have this particular group
5 nicknamed by one of those other plaintiffs?

6 MR. MCCAILL: Yeah, we typically refer to our
7 group as the Action Meat plaintiffs.

8 THE COURT: Okay. I will make that change. Thank
9 you. And I believe Robert Kaplan was also going to be
10 attending. Are you on?

11 MR. KAPLAN: Yes, I am, Your Honor. Good
12 afternoon.

13 THE COURT: And is -- are you expecting anyone
14 else on behalf of the Action Meat direct action plaintiffs?

15 MR. MCCAILL: I don't believe so, no, Your Honor,
16 just myself and Mr. Kaplan.

17 THE COURT: And next we have the Sysco direct
18 action plaintiffs, Sysco Corp. and Armory Investments. I've
19 got Michael Mitchell.

20 MR. MITCHELL: Present, Your Honor.

21 THE COURT: And Scott Gant?

22 MR. GANT: Yes. I'm here. Good afternoon,
23 Your Honor.

24 THE COURT: Anyone else on behalf of the Sysco
25 direct action plaintiffs?

1 No. Moving on to the direct action plaintiffs
2 that are commonly represented with Kraft Heinz foods. I
3 don't think I got an e-mail about any particular attorney
4 who was going to be attending, but is there anyone who wants
5 their appearance noted?

6 MR. AHERN: Your Honor, Patrick Ahern. I am also
7 counsel for Kraft Heinz, along with members of the
8 Cadwallader firm. I don't know if any of them are on right
9 now.

10 THE COURT: Is there anybody else who wants their
11 appearance noted for -- from the Cadwallader firm or
12 anywhere else for the Kraft Heinz direct action plaintiffs?

13 No. All right. So, Mr. Ahern, I have you noted
14 for that.

15 Moving on to the group of direct action plaintiffs
16 that is commonly represented with Nestle. I have got David
17 Eddy, are you on?

18 MR. EDDY: Yes, I am, Your Honor.

19 THE COURT: Is there anyone else who wants their
20 appearance noted for that group of direct action plaintiffs?

21 MR. EDDY: I don't think there will be anyone
22 else.

23 THE COURT: All right. Now we move on to the
24 defendants. Agri Stats, I've got Liam Phibbs.

25 MR. PHIBBS: Good afternoon, Your Honor.

1 THE COURT: Anybody else for Agri Stats?

2 MR. PHIBBS: I think this will be it for us,
3 Your Honor. Thank you.

4 THE COURT: For Clemens Food Group and others in
5 that family, I've got Max Samels.

6 MR. SAMELS: Here, Your Honor.

7 THE COURT: And I have got Vanessa Barsanti.

8 MS. BARSANTI: Good afternoon, Your Honor.

9 THE COURT: Anybody else for the Clemens
10 defendants?

11 Moving on to Hormel, I've got Craig Coleman.

12 MR. COLEMAN: Yes, Your Honor. Present.

13 THE COURT: Anyone else for Hormel?

14 MR. COLEMAN: No, Your Honor.

15 THE COURT: JBS USA -- it looks like one was --
16 well, let's just say JBS. One was terminated, but the JBS
17 defendant or defendants, Jessica Nelson.

18 MS. NELSON: Good afternoon, Your Honor.

19 THE COURT: Sami Rashid.

20 MR. RASHID: Good afternoon, Your Honor.

21 THE COURT: Anybody else on behalf of JBS?

22 MS. NELSON: No, Your Honor.

23 THE COURT: Seaboard Foods, I've got Peter
24 Schwingler.

25 MR. SCHWINGLER: Good afternoon, Your Honor.

1 THE COURT: Anybody else for Seaboard?

2 MR. SCHWINGLER: No. Just me. Thank you.

3 THE COURT: Smithfield Foods, I have Brian
4 Robison.

5 MR. ROBISON: Yes, Your Honor. Good afternoon.

6 THE COURT: And John Cotter.

7 MR. COTTER: Good afternoon, Your Honor.

8 THE COURT: Anyone else for Smithfield?

9 MR. COTTER: No, Your Honor.

10 THE COURT: All right. Triumph Foods, Christopher
11 Smith.

12 MR. SMITH: Good afternoon, Your Honor.

13 THE COURT: Jason -- is it Husgen or Husgen?

14 MR. HUSGEN: Husgen. Good afternoon.

15 THE COURT: Husgen. And now I know you're on.
16 Anybody else for Triumph Foods?

17 Moving on to Tyson, Jarod Taylor.

18 MR. TAYLOR: Good afternoon, Your Honor.

19 THE COURT: And Tiffany Rider Rohrbaugh.

20 MS. ROHRBAUGH: Good afternoon, Your Honor.

21 THE COURT: Anyone else for Tyson?

22 MS. ROHRBAUGH: No, Your Honor.

23 THE COURT: All right. Then I will assume that
24 I've got everybody who wants their appearance noted. And,
25 again, to the extent that in connection with future hearings

1 or case management conferences you can let my chambers know
2 by 10:00 of the specific names who are going to be
3 attending. Everybody did a pretty good job here, but just
4 remember to do that. It makes a huge difference not only
5 for me, but it also makes a difference for the court
6 reporter. And we want to make things easy for the court
7 reporter.

8 All right. So we've got an agenda for the
9 conference today. Are there any late, but, nevertheless,
10 met and conferred about additions to the agenda, or are the
11 parties satisfied with the agenda items as they were
12 submitted in Docket Number 1122 on January 17th? You don't
13 need to signal your assent. Just let me -- just speak up if
14 there is something new that you're proposing be added.

15 Hearing nothing, we'll go with that agenda. And
16 the first item on the agenda was to -- for the parties to be
17 heard on the proposed case management order in the MDL DAP
18 cases, the direct action purchaser -- or direct action
19 plaintiff cases. So let me set that aside and move to that
20 proposed scheduling order.

21 There were enough items -- as you could probably
22 tell from the fact I didn't enter a scheduling order, there
23 were enough items with enough implications for the
24 scheduling order as a whole that I thought it made sense to
25 just hear what you all had to say. But I have a working

1 draft going and should be able to get it entered today or
2 tomorrow after having heard from you about the open items.

3 So let me first, with all due respect to everybody
4 who's here, I'm going to try to rid my screen of everyone
5 who isn't actually going to be speaking to this. So if you
6 are not going to be speaking on this issue, I'm going to ask
7 you to block video, and then I'm going to hide non-video
8 participants so that I can focus on those of you who are
9 going to address these issues.

10 And let me find out first, who is going to be
11 speaking for this -- on these issues for the direct action
12 plaintiffs?

13 MR. MITCHELL: Your Honor, this is Mike Mitchell,
14 and I will be addressing these issues on behalf of the MDL
15 DAPs.

16 THE COURT: All right. And, Mr. Pouya, I assume
17 that you are going to be speaking to it to the extent that
18 there are comments or concerns on behalf of the class
19 plaintiffs; is that right?

20 MR. POUYA: I believe that may be Mr. Bourne, but
21 if it's not, I'm happy to address it.

22 THE COURT: Oh, okay. I don't see Mr. Bourne on,
23 and I do see you, so that's why I was jumping to that
24 conclusion.

25 MR. POUYA: We'll go with that then.

1 THE COURT: All right. Either is fine. Just want
2 to know who I should be looking for.

3 And then, let's see here, I've got Mr. Ahern, and
4 you may be addressing this for Winn-Dixie, I assume, and
5 possibly also for the Kraft Heinz direct action plaintiffs;
6 is that right?

7 MR. AHERN: Yes, Your Honor, but mostly to just
8 put into context what had happened with the Winn-Dixie DAPs
9 previous to this, because that has been invoked in some
10 sense, and just to -- if Your Honor needs me to address any
11 of that. If not, I will be happy to have Mr. Mitchell speak
12 for the Kraft Heinz as an MDL DAP.

13 THE COURT: All right. And then who will be
14 addressing this on behalf of the defendants?

15 MR. TAYLOR: Jarod Taylor, Your Honor.

16 THE COURT: All right. And I see -- I see a box
17 with Brian Robison's name, but the camera is blocked. So
18 I'm assuming he doesn't intend to speak up. If somebody is
19 hearing something that they feel they do want to address,
20 then you can signal me to that effect by turning your camera
21 back on, and then I will find out what you wanted to
22 contribute to the conversation.

23 So I've got the -- what I've got in front of me is
24 a -- well, I had a Word version that you all had previously
25 submitted of the proposed case management order that you had

1 submitted to Judge Tunheim back in August. You submitted a
2 variation on that in December. I don't know that I ever got
3 a Word version of that. But what I did is take the Word
4 version of what you had sent to Judge Tunheim in August, I
5 modified it to take into account your version submitted in
6 December, and, along the way, I may have some questions for
7 you about things that you took out between August and
8 December to find out if you meant to take them out or if
9 there's some reason they should not be included.

10 And I also understand that the principal concerns
11 or the principal disputes have to do with the deadline for
12 amended pleadings, with the limits -- proposed limits on
13 interrogatories and requests for admissions, with the limit
14 on depositions, and with whether there ought to be something
15 said about discovery limits applicable or some condition
16 precedent that ought to happen if there are new direct
17 action plaintiff cases who enter the -- this litigation
18 after some particular point, whether it's after today or
19 after January 10th or after some other designated date.

20 So those are the four disputes that I saw teed up
21 in the joint statement, and which I understood that the
22 parties wanted to have -- and at least the plaintiffs
23 indicated they wanted to have argument -- actual oral
24 argument on today. Anything I've misunderstood about that
25 so far?

1 MR. MITCHELL: I don't believe so, Your Honor.
2 This is Mike Mitchell. I believe you've accurately
3 summarized what has been somewhat of a long and tortured
4 history in getting this proposal before you.

5 THE COURT: All right.

6 MR. TAYLOR: Your Honor, if I may?

7 THE COURT: Yes, Mr. Taylor.

8 MR. TAYLOR: I apologize. I don't mean to
9 interrupt, but the other issue in dispute was whether the
10 MDL DAPs should file a consolidated complaint.

11 THE COURT: I'm sorry. That was -- I had sort of
12 in -- that was part of the same section, but you are right,
13 it is a different subject from deadlines. And you are
14 absolutely right. That is in there as well.

15 MR. TAYLOR: Okay. Perfect, Your Honor. Thank
16 you.

17 THE COURT: All right. So let's start with the
18 issues around amended complaints. And I guess I'm inclined
19 to start with the issue of the -- of whether there ought to
20 be a consolidated complaint, and then go from there -- a
21 consolidated amended complaint, and then go from there to
22 the deadline.

23 So I've read the parties' submissions on this. I
24 think I understand the issues pretty clearly, but I am
25 interested in hearing any elaboration that either side may

1 want to add to what was in your written submission.

2 So, Mr. Mitchell, since you are arguing for the
3 direct action plaintiffs, let me hear from you about why the
4 direct action plaintiffs believe that a single consolidated
5 complaint is not where you want to go with this?

6 MR. MITCHELL: Sure. Thank you, Your Honor. I
7 think that our written submissions on this point articulate
8 well the reasons why we think this is a bad idea. But, in
9 short, we think that there are, first, a number of good
10 reasons not to do it, and I think, second, I don't think the
11 defendants have identified any good reason to do it.

12 So, first -- and I think these are set forth in
13 our papers, but I think there is one update that I think is
14 worth mentioning to the Court. So the good reasons why not
15 to do -- or why there should not be a consolidated amended
16 complaint in this case is, first and foremost, that this is
17 an MDL proceeding in which each of the direct action
18 plaintiffs are separate entities and after pretrial
19 proceedings will have their complaints remanded back to the
20 courts in which they were originally filed. So for that
21 reason, we believe it is important that each of our own
22 complaints remain that way since that is what will happen at
23 the end of pretrial proceedings in this MDL.

24 This is not a class action, as we state in our
25 papers, where a consolidated amended complaint is routine

1 because the various plaintiffs in that case -- in class
2 actions all represent or seek to represent the same class.
3 That is not the case with respect to the direct action
4 plaintiffs.

5 I think the other point that bears emphasizing is
6 the experience of many of the same parties in this
7 litigation in the *Broiler Chicken* litigation, where the
8 Courts did require a consolidated amended complaint be
9 filed, which I think -- and there may well be others,
10 including my colleague Scott Gant, who could add additional
11 color on this point -- has not at all lessened the burden on
12 the parties in that case, has, in fact, raised a whole host
13 of additional issues and complications, which, to this day,
14 remain unresolved. Most significantly, whether such
15 consolidated amended complaint is simply there for
16 administrative convenience or whether it has some
17 substantive effect on the claims that are being pursued by
18 the direct action plaintiffs. So, in short, I think it has
19 complicated matters there significantly, and drawing upon
20 that experience, we here likewise believe that that is not
21 the way to go -- not the way to go in this case.

22 THE COURT: Let me just ask you a couple of
23 questions about the points you have made so far. I mean,
24 one of the things defendants point out about *Broiler Chicken*
25 is that by the time the Court decided to require a

1 consolidated amended complaint, it was far along in the
2 case, a lot of plaintiffs had already filed complaints, and
3 the defendants suggest that's, to some extent, why -- if it
4 was -- if it turned into a tortured exercise, that it was
5 because of the point in the litigation in which it occurred.
6 And I would think that might also then explain why the --
7 trying to understand why it was in it for administrative
8 purposes or substantive purposes may also have been a bit
9 ambiguous. So does the *Broiler Chicken* experience really
10 tell us much here given that we're significantly earlier in
11 the history of the and the number of direct action
12 plaintiffs?

13 MR. MITCHELL: Your Honor, I see my colleague
14 Scott Gant has taken himself off mute. I think given that
15 he has been deeply involved in those issues in *Broiler*
16 *Chicken*, I think he'd like to address that if you'd allow
17 it.

18 THE COURT: I'd be fine hearing from him.
19 Mr. Gant, are you on audio only or are you on video as well?

20 MR. GANT: I am on audio only because my laptop
21 camera is broken, Your Honor, and I have been unable to get
22 it repaired by the office, so I apologize. May I proceed by
23 audio only to answer your questions?

24 THE COURT: You absolutely may, but -- and the
25 record will reflect it's Mr. Gant who is speaking. Just

1 speak slowly because it's probably another potential layer
2 of difficulty for the court reporter. So speak slowly,
3 please.

4 MR. GANT: I will, Your Honor. Thank you. And
5 just to add one other additional piece of information, I
6 also serve as the liaison counsel for the direct action
7 plaintiffs in the *Broiler Chicken* litigation. So not only
8 have I represented clients in that case for almost four
9 years now but have served in the role of liaison counsel for
10 almost as long. So I am knee-deep in the experience of that
11 case.

12 There are -- the short answer to your question,
13 Your Honor, is I don't think that actually fully explains
14 the difference. And one thing that is important to keep in
15 mind about any of these comparisons to the *Broiler Chicken*
16 litigation is, although it has a lot of features of the
17 multidistrict litigation, it is not an MDL. In fact, many
18 observers and sometimes even parties seem to forget that
19 fact.

20 Everyone who has filed a case there in Chicago is
21 staying there for the duration. Here, however, very
22 intentionally -- we learned a lot of lessons from the
23 *Broiler Chicken* litigation and a lot of unintended
24 complications or problems that arose from the fact that it
25 is not an MDL, and it's for that reason, you may recall

1 Your Honor, that our group, our clients, along with the
2 lawyers from Carlton Fields for their clients, were the ones
3 who sought an MDL in this case very intentionally.

4 And as my colleague, Mr. Mitchell, points out,
5 unlike in *Broiler Chicken* where everyone is staying there,
6 here, at the end of pretrial proceedings, people will go
7 back to their own court. So, for example, Your Honor, Sysco
8 filed its case in Texas in federal court. And assuming,
9 hopefully, we will survive summary judgment, and then go
10 back there for trial as will the dozen or dozens of other
11 cases here.

12 And if we do go back, if we're forced to
13 consolidate a pleading over our objections, we will then
14 have to figure out what is the operative pleading for each
15 of the constituent direct action plaintiffs and then have to
16 file new complaints, presumably, that conform to our own
17 views when we go back.

18 So if we have -- are actually getting anything on
19 the front end from consolidation, the Court should -- and I
20 have doubts about that, which I'd be happy to address -- on
21 the back end, we're going to have new problems because we'll
22 have to create new complaints to take apart a consolidated
23 pleading.

24 But, in fact, in *Broilers*, there remains to this
25 day uncertainty about whether the pleading the Court

1 compelled the direct action plaintiffs to file together is
2 administrative or substantive. The briefing on that issue
3 still hasn't been ruled on by the Court. And we're just
4 carrying on. The Court gave us an opportunity to file a
5 second amended complaint, which we'll be doing on
6 February 14th.

7 And just for some perspective, Your Honor, that
8 pleading will probably be approximately 500 pages. So what,
9 in part, it ends up doing is just putting the individual
10 allegations and claims of different DAPs into a single piece
11 of paper. It has not, I think, provided clarity about the
12 pleading in the case, and I don't think has materially
13 advantaged the defendants in terms of the burden of
14 responding.

15 The claim that I've heard both in this case and in
16 *Broilers* from the defendants is we just don't want to have
17 to file answers in responses to all the complaints. I leave
18 it to the Court to decide whether or not the rules require
19 answers, notwithstanding what the administrative
20 conveniences may be.

21 But what's particularly imperative from my
22 perspective is that each plaintiff -- each direct action
23 plaintiff have affirmative -- defenses and affirmative
24 defenses from each defendant to its own allegations, because
25 the defenses and affirmative defenses may differ by direct

1 action plaintiff. And each direct action plaintiff is
2 entitled at an early stage of the case to know what those
3 are so that it can conform its strategy in discovery to
4 address those. And that is critically important, and I
5 think all direct action plaintiffs will share that
6 perspective.

7 Whether or not there's some kind of administrative
8 maneuver to defer other aspects of the answers to later in
9 the case, which may result in some minimizing of the burden
10 on defendants, I think at least our clients, Mr. Mitchell
11 and I, are open to that. But it's imperative that we get
12 answers and affirmative defenses that are specific to our
13 own case, and we don't think that we should have to combine
14 our allegations with separately-filed cases into one
15 document. We don't think that the rules actually provide
16 for that. But there's no real savings. And as I said,
17 we're going to be paying on the back end as well.

18 And then there's the question of whether it's
19 administrative or substantive, which still remains
20 unresolved in the *Broiler* case. And if it's just
21 administrative, then, you know, there's a question about
22 what it actually means and how useful it is. And if it's
23 substantive, then that raises its own problems.

24 THE COURT: All right. Thank you, Mr. Gant.

25 Mr. Mitchell, was there anything more you wanted

1 to say on this before I give Mr. Taylor his say?

2 MR. MITCHELL: No. That is it, Your Honor. Thank
3 you.

4 THE COURT: All right. Mr. Taylor -- and you are
5 welcome to bring another lawyer in if you'd like to as
6 well -- but do you want to comment?

7 MR. TAYLOR: I'll start at least, Your Honor.
8 Yes, if I may, thank you. So, first of all, just to clarify
9 what we're seeking, we are seeking a consolidated complaint
10 that would be the sole legally operative complaint but for
11 each MDL direct action plaintiff in its own individual
12 direct action. This complaint would not legally merge the
13 actions. Each action would still maintain separate
14 existence and could be remanded for trial after the pretrial
15 proceedings, but what the complaint would do is simplify the
16 administration of this case for the Court and reduce
17 unnecessary expense for the parties or at least certainly
18 for defendants.

19 Defendants believe there are a myriad of reasons
20 to consolidate and no strong reason not to consolidate. MDL
21 DAPs have raised the specter of some problems but I believe
22 haven't explained why there would actually be those -- those
23 problems would actually arise. So let me go through in more
24 detail.

25 First, with respect to assistance to the Court

1 with administration of the case, if the complaints aren't
2 consolidated, eventually, even under MDL DAPs' offer to
3 postpone answering most of the complaints, the docket will
4 be inundated with answers that defendants will have to spend
5 an unnecessary amount of time carefully and painstakingly
6 drafting.

7 There are now 24, I believe, at last count,
8 separate complaints with eight defendants. If I did my math
9 right -- I got help from my 10-year-old on this one --
10 that's 192 answers. JBS has settled with some DAPs, so that
11 192 answers isn't exact, but it's a ballpark. There are
12 also 40 opt-outs from the JBS class settlement that have not
13 yet filed, and there are two current DAPs who did not opt
14 out from the JBS settlements, so we really don't know how
15 many more DAPs could enter and exactly how large this case
16 will balloon to, but it took a long time to call roll this
17 morning, and it's not an insignificant number.

18 In addition, there are other filings before then,
19 however, that will impact the docket as well and create
20 unnecessary complexity without a consolidated complaint.
21 For example, defendants will likely file partial motions to
22 dismiss the complaints to limit the damages period. Based
23 on the statute of limitations and -- defendants would prefer
24 to fight -- to brief one motion and to have one opposition,
25 which we believe will be most efficient for the Court and

1 the parties. And, similarly, a little ways down the road,
2 multiple complaints create the potential for multiple
3 motions for summary judgment against what are essentially
4 identical claims, or, at the very least, very unwieldy
5 appendicis setting out the multiple similar or identical
6 allegations asserted in each complaint.

7 The Court --

8 THE COURT: Let me just ask a question,
9 Mr. Taylor.

10 MR. TAYLOR: Of course.

11 THE COURT: Is there any reason why those
12 particular concerns -- motions to dismiss, motions for
13 summary judgment, that sort of thing -- is there any reason
14 why those issues can't be addressed on their -- as they come
15 up? In other words, it's not at all unheard of, and we've
16 done it in this and other cases, where the Court will order
17 the parties to collaborate on a joint motion for summary
18 judgment or a joint opposition, and then to file
19 supplemental briefs to the extent there are individualized
20 issues. So I don't know that that -- we can do that. We
21 can handle that. I don't know why that necessarily drives a
22 decision about whether there will be a consolidated amended
23 complaint.

24 MR. TAYLOR: I think it would be -- we would
25 certainly try, Your Honor, with or without direction from

1 the Court, I believe. I think it would be simpler to limit
2 the necessity for supplemental briefs and to avoid potential
3 sandbagging from an allegation or a paragraph that might
4 appear in one complaint but not the others that didn't get
5 picked up in the consolidated motion to dismiss. Defendants
6 acknowledge that, you know, parties do their best to try to
7 condense things and not give too much paper to the Court. I
8 agree we might not need an actual completely separate motion
9 to dismiss that is, you know, identical in at least sections
10 against each complaint, but even the administration of those
11 motions, it would be simpler if there were one complaint
12 that all the parties and the Court could work from.

13 But to the next --

14 THE COURT: So --

15 MR. TAYLOR: Sure. Go ahead.

16 THE COURT: So it sounds like one of the things
17 you're proposing would be easier -- and we'll just talk
18 about motions to dismiss -- is if there -- if you are
19 supposed to answer individual complaints, is the idea that
20 you would also then be filing individual motions to dismiss,
21 and does that mean the Court might be seeing 20 motions to
22 dismiss rather than a single motion to dismiss a
23 consolidated amended complaint? I mean, is that -- is that
24 the question you're raising?

25 MR. TAYLOR: I don't -- I don't think that's the

1 question we're raising, Your Honor. We would -- we would
2 need to file eight answers to a single consolidated
3 complaint, but I think there would still be consolidation of
4 the motion to dismiss.

5 THE COURT: Okay.

6 MR. TAYLOR: Because I think allegations to which
7 motions to dismiss would be directed, I think, are against
8 all defendants and not likely to be defendant-specific.

9 THE COURT: All right. And I assume,
10 Mr. Mitchell -- and I'll certainly give you a chance to move
11 to your next point, Mr. Taylor -- but just as a check-in
12 question, Mr. Mitchell, the -- in opposing the idea of a
13 consolidated amended complaint, plaintiffs are not -- the
14 direct action plaintiffs are not saying that -- that
15 defendants would not only need to file separate answers to
16 each complaint but would also need to file separate motions
17 to dismiss as to each complaint?

18 MR. MITCHELL: That's correct, Your Honor. We are
19 not saying that.

20 THE COURT: Okay. Okay. All right. Please,
21 Mr. Taylor, go ahead.

22 MR. TAYLOR: Sure. And just to elaborate on that
23 one once more with one more point before I move on,
24 Your Honor. One thing, even if we had consolidated
25 briefing, that could be avoided with a consolidated

1 complaint is the lengthy footnote addressing all of the
2 relevant paragraphs from all of the different complaints.
3 And maybe that can be worked out. Sometimes -- sometimes
4 it's difficult to work that out and simplify that process.
5 I think part of the issue is we know we can simplify things
6 on the front end, and it's hard to see exactly what
7 complications can arise later and the complexities that can
8 arise if we don't have consolidation. And we are dealing
9 with 24-plus separate complaints throughout the pretrial
10 life of this case.

11 But separate from -- and my final point on this
12 item is, you know, I think we should remember that the order
13 to consolidate in the *Broilers* case was sua sponte. I don't
14 want to put thoughts or words in the judge's mouth or head,
15 but it appeared to us that the judge had kind of had enough,
16 and, you know, we would like to avoid that here. But there
17 is, of course -- defendants are focused. We are
18 self-interested here, happy to admit.

19 It is unnecessarily burdensome to go through the
20 dozens or even hundred-plus pages of separate complaints
21 again and again to make answers. And you might think, well,
22 if they are so similar, you know, it shouldn't be that
23 burdensome. But the problem is an answer is, of course, an
24 impactful, meaningful document that no defendant can take
25 lightly. We can be bound by what we put in there. So to

1 some extent, you know, I don't want to say we're starting
2 over, but we have to -- we have to look at each allegation
3 and each different complaint separately, individually, one
4 by one with attorneys' eyes on each. It is not something
5 that can be handled haphazardly.

6 And I think having all of those multiple answers
7 is something procedurally that has to be done. It's
8 time-consuming and expensive, but, frankly, I don't think it
9 materially advances the ball for the case or any party to
10 have all of those answers sitting out there. And if we were
11 to -- if defendants were to answer and provide -- and
12 provide affirmative defenses to a consolidated complaint, I
13 think it is relatively simple to specify to which DAPs any
14 affirmative defense applies. That's a very simple list
15 after each affirmative defense. I really don't think that
16 would be a problem.

17 Turning to MDL DAPs' reasons not to consolidate,
18 consolidated complaints, as was half acknowledged, I think,
19 by my colleague Mr. Mitchell, are a regular feature of
20 complex antitrust litigation. To the extent they are not
21 regular features with respect to non-class actions or direct
22 action plaintiffs, that might be because before the *Broilers*
23 case, I don't think it was that routine for so many early
24 individual actions to file on top of a class action, but
25 that happened in that case, and the Court saw fit to order

1 consolidation on its own, and so it might become routine.

2 With respect to the MDL and remand point, I don't
3 believe MDL DAPs have actually cited to a case in which
4 remand was in any way impeded by consolidation. There
5 certainly are cases that specify that cases will be remanded
6 back to their individual districts. We did cite to at least
7 one MDL DAP case in our joint statement. And there's just
8 no reason to believe why a consolidated complaint would
9 impede remand. No Court that defendants are aware of has
10 been unable to remand, nor has an individual plaintiff been
11 surprised by some inadvertent waiver. Even in a non-MDL
12 situation like *Broilers*, the individual direct action
13 plaintiffs are still entitled to try their case separately,
14 so they will have to be separated at the end for trial even
15 if in the northern district instead of another district. So
16 I don't think that point is well taken.

17 THE COURT: Let me ask this, I think -- I can't
18 remember if it was Mr. Mitchell or Mr. Gant made the point
19 that when the consolidated complaint -- amended complaint
20 was filed in *Broiler Chicken*, it was voluminous, to say the
21 least. Was it that much -- and I guess my impression was it
22 was that much more voluminous than any of the individual
23 complaints had been leading up to it because of the need to
24 capture everything that everybody was saying, which doesn't,
25 to me, sound like an improvement on the status quo. Can

1 you -- are you able to comment on that, Mr. Taylor? How
2 did what ended up getting filed compare with the individual
3 complaints that had been filed previously?

4 MR. TAYLOR: So, you know, two points, I think,
5 Your Honor. One is defendants nevertheless would rather do
6 this one-and-done rather than do this seriatim. There
7 certainly were some savings, some identical allegations. I
8 don't think that can be denied. But the *Broilers* case
9 became more varied than the *Pork* case is.

10 Without getting too deep into the weeds, there
11 were certain subsets of defendants that were what are known
12 as Georgia Dock defendants where alleged manipulation of a
13 pricing index was also alleged in addition to mere supply
14 reduction. There were also other particularized allegations
15 of misconduct with respect to certain defendants that did
16 not apply to others. It -- and there were also, I believe,
17 a greater number of differing claims, such as RICO claims,
18 by certain plaintiffs and not others. So that is part of
19 the complexity there that we do not anticipate at least at
20 this point in the *Pork* case.

21 Nevertheless, even with that complexity, again,
22 better to go through that process one time rather than --
23 you know, all of those allegations would nevertheless have
24 been in the case simply in separate complaints. It wasn't
25 on top of all the other complaints that all the parties

1 still had to do with. There was one consolidated complaint,
2 as the name indicates, that everyone could refer to for all
3 purposes, which defendants did find both convenient and too,
4 in this case, where it is before we have answered, we would
5 find savings from having just the one answer.

6 THE COURT: All right.

7 MR. KAPLAN: Your Honor, it's Robert Kaplan for
8 the Action Meat plaintiffs. May I add one point here,
9 please?

10 THE COURT: Yes, Mr. Kaplan.

11 MR. KAPLAN: Yeah, manageability. If we had done
12 what the defendants wanted last August, we now have another
13 group of DAPs that have just been transferred in by the MDL,
14 would we have to now do another consolidated complaint? I
15 believe another case has been filed, which will probably be
16 transferred here. Would we have to then do another
17 consolidated complaint? So this is a moving target. As
18 more DAPs come in, we'd have to keep doing it, changing it,
19 so I don't -- you know, there's a manageability issue here
20 also.

21 THE COURT: But isn't -- although I realize that
22 this scenario is somewhat unusual for antitrust cases,
23 hasn't it pretty routinely been the case in big product
24 liability MDLs that there will be a master complaint of a
25 short form complaint and a short form answer and the parties

1 sort of adopt (video and audio distortion) of the forms --
2 oops, hold on one moment.

3 I'm going to check with the court reporter. Are
4 you hearing me okay?

5 THE COURT REPORTER: Yeah, but you just froze up
6 just one second there.

7 THE COURT: I did because my (video and audio
8 distortion).

9 THE COURT REPORTER: Oh, now you're frozen again.

10 THE COURT: Looks like we're freezing.

11 Okay. Hold on a moment. I just need to
12 reconnect.

13 THE COURT REPORTER: And while we're waiting for
14 her to do that, the people that are on the phone, can you
15 make sure you are on mute, because some people are bumping
16 in and interrupting?

17 THE COURT: Okay. All right. I think that should
18 be fine going forward. Thank you for your patience.

19 So there are MDLs, particularly in the product
20 liability field, where despite the fact that they are all
21 going to go back to their respective states for trial, the
22 Court has -- has implemented a process that involves a
23 master complaint and to try to -- to try to have some
24 consistency to the pleadings. So, Mr. Mitchell, or
25 whichever of you would like to address this, why doesn't

1 that make sense here?

2 MR. GANT: Your Honor, it's Scott Gant. If I may?

3 THE COURT: All right. Yes. Thank you.

4 MR. GANT: So I have a few points, but let me
5 start with the question you asked, Your Honor. And just
6 for -- what we did in *Broilers*, after -- over our objections
7 filing a -- a consolidated pleading, is that the practice
8 has been to file a short form joinder. But that does not,
9 necessarily, resolve Mr. Kaplan's question. Because that
10 has been done not by order but by convention. And there
11 would be nothing to stop a new direct action plaintiff in
12 the *Broiler* case to have filed their own complaint, which
13 may have differed in its take on the allegations, and then
14 we would have been presented with precisely the question
15 that Mr. Kaplan raises which has been a concern all along in
16 that case, which is, what do you do when there's an
17 amendment?

18 But we also raise -- if I could provide some
19 additional factual information, you honed in on a
20 particularly important and salient point from the *Broiler*
21 experience. As I mentioned, the pleading was voluminous. I
22 just looked. And the consolidated -- amended -- we amended
23 the consolidated pleading once. And I just pulled it up.
24 It was 401 pages before the signature blocks. As I
25 mentioned, we are filing a new amended complaint in *Broilers*

1 on February 14th. The current draft of that is
2 approximately 500 pages, and I can tell you from having gone
3 through this process now with the original consolidated
4 pleading and now two more amendments, each time it takes
5 hundreds of hours of direct action plaintiff attorney time
6 to put these together.

7 What the defendant -- the defendants are asking
8 the Court to undertake this measure to relieve them of
9 largely what they call administrative burdens of having to
10 answer individual complaints, but what they are really doing
11 is shifting the burden substantially from them to us. And
12 that's not the structure of Rule 15, I submit. Under the
13 rules, the plaintiffs file their complaints and then
14 defendants answer. We have attempted to make constructive
15 practical suggestions consistent with Rule 15 to alleviate
16 some of the burdens on the defendants. We proposed they
17 only answer one of the complaints as an exemplar, and I
18 think we gave them a specific complaint. I think we
19 proposed the Sysco complaint, but I may be wrong at that. I
20 said, Just answer one complaint in full as an exemplar and
21 then give each DAP its own answers and affirmative defenses
22 to the extent they differ.

23 And, of course, and oftentimes in my experience,
24 defendants forget that Rule 15 also obligates, to the extent
25 that they assert defenses, that they assert the factual

1 defenses. So Mr. Taylor suggested, Oh, we'll just put a
2 list of affirmative defenses and say every DAP that applies
3 to. I'm not sure that would satisfy Rule 15, because you
4 actually have to specify the factual basis and it may differ
5 for a particular DAP. So, for example, if you have a
6 contract-based defense, you have to say what the contract
7 is. It's not -- the same contract that applies to Sysco
8 doesn't apply to Cheney Brothers.

9 So we believe we're entitled to affirmative
10 defenses and affirmative defenses that actually satisfy the
11 rules, and we're entitled to those soon and in response to
12 one complaint as an exemplar, and then we're willing to
13 defer the rest of it until later, which should resolve most
14 of the administrative burden that the defendants are seeking
15 relief from. And they are seeking relief from it by putting
16 an enormous burden on the plaintiffs.

17 They also assume, I think, incorrectly, that
18 there's going to be unanimity from the direct action
19 plaintiffs on every point. And part of what took so long
20 about doing this in *Broilers* is there are differences of
21 views. That's why the direct action plaintiffs have each
22 necessarily decided to file their own cases. They want to
23 control their own destinies, they want to have their own
24 counsel, and they want to articulate their theory of the
25 case in their own ways. There may be substantial overlap to

1 be sure, but there are also differences.

2 Mr. Taylor brought up the question of the statute
3 of limitations. The DAP complaints are not unanimous in how
4 they are approaching that issue. We had some arguments that
5 differed from people that filed after us. And what are
6 we -- so all we're doing then is having to spend an enormous
7 amount of time caucusing and then putting in a complaint
8 things that may be different from one another or
9 contradictory to one another. So this is an enormous shift
10 of work from them to us. We were proposing to do everything
11 reasonably possible to alleviate them of unnecessary work
12 while allowing us to understand their defenses and then
13 litigate the case.

14 THE COURT: We need to move on to a different
15 topic. I will tell you where I am leaning, but this is
16 something I'm going to want to consult with Judge Tunheim
17 about, not only because he is the District Judge on this
18 case, but also because he is the chief judge in the district
19 and, therefore, may have some views on administrative
20 burdens and convenience and that sort of thing.

21 But I will tell you I am leaning against the
22 consolidated complaint. I am -- I am probably -- after
23 consulting with Judge Tunheim, but if he does not disagree
24 with me, I am inclined not to adopt the consolidated
25 complaint approach.

1 I do have one question for either Mr. Mitchell or
2 Mr. Gant. When you talk about, in your proposal, about the
3 defendants providing their -- not needing to answer every
4 complaint, but answering one exemplar complaint, and then
5 providing their defenses to each direct action plaintiff,
6 was that in -- what form had you imagined that would take?
7 Is that something that defendants would file? Is that
8 something that defendants would serve? Would it be part of
9 the initial disclosures? What was the form that you had
10 contemplated for that disclosure by defendants?

11 MR. GANT: Your Honor, this is Mr. Gant. I'm not
12 sure we had gotten to the point of discussing the logistics
13 with the defendants, but it's certainly my view that the --
14 both the exemplar and the answers -- excuse me -- defenses
15 and affirmative defenses to specific DAP complaints should
16 be filed. That that's the best practice. But we're open to
17 any other suggestions from the Court or from the defendants
18 about the logistics of that. But I do think that it's
19 important that those documents be filed, and I think that's
20 consistent with the letter and the spirit of Rule 15.

21 THE COURT: Okay. And the -- but the exemplar
22 answer or the answer to the exemplar complaint, that -- that
23 would -- you would view that as a real answer, not just a --
24 not just a sample answer? But that would stand as the
25 defendants' answer to that particular complaint, and if they

1 wanted to amend it at some point, they would need to move to
2 amend the answer; is that right?

3 MR. GANT: That's my view, Your Honor.

4 Admittedly, I don't think we've discussed that at length
5 within the group, so I hope I'm not out over my skis, but I
6 think that is right, Your Honor.

7 THE COURT: Okay. Okay. All right. So as I say,
8 I've told you where I'm leaning on this, and I'm leaning
9 pretty hard, although, Judge Tunheim, he weighs more than I
10 do. He can push me back over the fence on the other side.
11 But I do think -- given my leaning, I do think it would make
12 sense for you all to talk about and see if you can reach
13 agreement on the logistics of that answer to an exemplar
14 complaint and the provision of defenses to the complaints
15 which aren't being answered yet, because it would work a lot
16 better if you crafted language that made practical sense to
17 you as opposed to me crafting language that might not
18 reflect the realities that you're dealing with.

19 So I'm going to direct you all to meet and confer
20 on that issue along a parallel path with my conversation
21 with Judge Tunheim. And could you get me something by the
22 end of the week? Understanding that it's not defendants
23 waiving any arguments they have got on the subject, but if
24 you could get me something by the end of the week that
25 captures the language that you believe ought to go into the

1 scheduling order, assuming that I reject the consolidated
2 amended complaint proposal. All right. Mr. Mitchell, that
3 work for you?

4 MR. MITCHELL: We will do that, Your Honor. Thank
5 you.

6 THE COURT: Okay. Mr. Taylor, for you as well?

7 MR. TAYLOR: Sure. We can do that, Your Honor.

8 THE COURT: All right. Thank you.

9 Let's move on to the issue of the deadline. And I
10 heard -- I heard about some of this, I think, in prior
11 discussions, certainly read the letters. I will tell you,
12 again, where I -- let me start by telling you where I'm
13 leaning and then let you respond to that. Where I'm leaning
14 is to give the MDL direct action plaintiffs until the end of
15 April to file amended complaints but not to adopt their
16 language -- or to file a motion to amend the complaint, not
17 just -- you know, not just file as a matter of right, but a
18 motion to amend the complaint, but to -- I lost my train of
19 thought -- but to not adopt the language that said "or a
20 certain number of days before the conclusion of fact
21 discovery, whichever is -- whichever is later." Now, it may
22 be -- and I didn't count -- I didn't count months -- that
23 the end of April is that many days from the conclusion
24 you've proposed for fact discovery, but I don't want that --
25 I don't want that sliding. I want a date by which amended

1 complaints -- or motions to amend the complaints must be
2 filed.

3 Now, let me check first about that assumption,
4 because the plaintiffs' proposed language talked in one
5 sentence about amended complaints must be filed by, and then
6 in the next paragraph talked about motions to amend the
7 complaint. So I'm assuming we're talking motions unless you
8 can amend as of right under the rules, but maybe I
9 misunderstood what you were asking for. Mr. Mitchell.

10 MR. MITCHELL: Yes, Your Honor. I think, first,
11 let me respond to what you're proposing. I think that that
12 makes sense to us. I think when this -- when our proposal
13 was originally made back in August, obviously a lot of time
14 has transpired since then, and, you know, we are many months
15 later now and also many months later closer to the end of
16 fact discovery. So omitting the language at the end,
17 the "or four months before the end of fact discovery,
18 whichever is later," I think is acceptable to us given where
19 we are now.

20 I think with respect to what we are proposing, I
21 believe that we had contemplated that we would be able to
22 file an amended complaint as of right by April 30th, 2022,
23 informed by the discovery that we had taken up to that
24 point. I think -- and what we were -- what we were also
25 particularly trying to avoid is having to -- if we are

1 required to file a motion for leave to amend under Rule 15
2 before that date, what we do not believe is appropriate is
3 to also require us to have to satisfy Rule 16, the burden --
4 the standard for amending the scheduling order. So if it is
5 that we are required to move to amend under Rule 15 in order
6 to amend the complaint by April 30th, then we would also ask
7 and it be made clear that we do not also have to satisfy
8 Rule 16 to do that.

9 THE COURT: I mean, if -- it depends on what piece
10 of Rule 16 we're talking about. I mean, but if the deadline
11 is April 30th for filing a motion to amend the complaint,
12 then, by definition, it's prior to the deadline set by the
13 scheduling order, and, therefore, you don't need to move to
14 amend the scheduling order in order to move to amend the
15 complaint. A motion filed after that would require a motion
16 to amend the scheduling order, and, for example, you would
17 need to show good cause why something that you diligently
18 sought but did not get in time to inform your amended
19 complaint is good cause for moving to amend after the
20 deadline. But I don't see how amending the scheduling order
21 would be an issue if you had -- if you filed your motion to
22 amend before April 30th.

23 The -- the main difference is that if the
24 defendant or defendants implicated by the proposed amended
25 complaint want to oppose it on grounds of futility, then

1 there's obviously a difference between getting to file your
2 amended complaint as a matter of right and then defendants
3 file their motion to dismiss if they so choose, or if you
4 move to amend the complaint and the defendants decide that
5 they are either going to agree -- you would have, of course,
6 done your meet and confer -- or if they are going to oppose,
7 and if they are going to oppose, are they opposing on
8 grounds of futility? Essentially kind of jumping to the
9 12(b)(6) analysis at that point.

10 There are -- you know, I can imagine reasons that
11 would go either way, but in the ordinary course, a
12 scheduling order would set a deadline for filing a motion to
13 amend as opposed to a deadline just to, you know, file your
14 amended complaint.

15 I think the other reason it's important to be
16 clear here is that if we don't go the consolidated complaint
17 route and defendants are allowed to not answer the
18 complaints along the way, then that -- I don't want there to
19 be sort of a -- an endless opportunity left open by the fact
20 that a responsive pleading hasn't yet been filed. And I
21 have not tried to figure out how that would interplay with
22 the rules, but I could see the potential for the sort of
23 continuing open season to file a -- an amended complaint
24 within X days after a responsive pleading has been filed.
25 And I -- I want to cut that off.

1 So, Mr. Taylor, any -- any comments or thoughts on
2 this one way or the other?

3 MR. TAYLOR: No, Your Honor. I don't think so.
4 But we do appreciate Your Honor's attention to clarity about
5 the implication of the deadline and exactly what it will be
6 and making sure there's not an open season for iterative
7 complaints. But I think, you know, Your Honor read our
8 papers and we appreciate your consideration.

9 THE COURT: All right.

10 MR. GANT: Your Honor, this is Scott Gant. May I
11 make one observation about the concern about open season for
12 amendment?

13 THE COURT: Yes, Mr. Gant.

14 MR. GANT: If you -- first of all, Your Honor, I
15 apologize. When I was talking about answering defenses and
16 affirmative defenses, I meant to refer to Rule 12's
17 obligations and not Rule 15, I misspoke, which may have
18 confused you, but I apologize about that. But if Your Honor
19 is taking us up on our suggestion that the defenses and
20 affirmative defenses to a complaint need to be filed, it
21 seems to me that would serve the same role as the filing of
22 a full answer for purposes of determining whether amendment
23 is permitted or not, wouldn't it?

24 THE COURT: Potentially, but it's -- it's sort of
25 a new -- a new type of beast, and so I think bottom line we

1 just need to be clear about what it is and what it means for
2 purposes of the rule. So I do think that's something that
3 ought to be a part of your meet and confer, you know.

4 MR. GANT: Agreed, Your Honor, and I think -- and
5 we will not attempt to game play or exploit, but -- so we
6 will --

7 THE COURT: And -- yeah, and I didn't think you
8 would, but I -- at all. But I -- but to the extent we can
9 be clear now, then people know what to expect down the line.
10 All right.

11 MR. GANT: Thank you, Your Honor.

12 THE COURT: Let's move on, then, to -- I think
13 we've done as much as we can do on amended complaints. And
14 I suppose theoretically there could be amended answers as
15 well. By that I don't mean answers to amended complaints
16 but truly amended answers, and so you probably ought to
17 think as well about how we're going to treat this -- how
18 we're going to treat the document which will stand in place
19 of an answer until the defendant is required to serve a full
20 answer to any given complaint and how will that be treated
21 for purposes of motions to amend the answers.

22 All right. Let's move on then. Okay. I'm just
23 moving in order to the things that are in your proposed case
24 management schedule. Let me...

25 All right. I did have one question at the very

1 beginning, just so I'm clear. The -- you had in your -- in
2 the order you had originally filed, you had some
3 introductory language (inaudible due to audio distortion)
4 along the way. But in your December version of the order,
5 some of that was deleted. Was that deliberate or were you
6 just trying to hone in on where -- kind of what the guts
7 were, where the disputes were? Mr. Mitchell?

8 MR. MITCHELL: Sure. If I can answer that. So
9 the -- I would say in going back to the very beginning of
10 this conference when you were asking some questions about,
11 you know, what changed between the August and December
12 submission, I think what we were trying to do there was in
13 light of the consolidation order from Judge Tunheim which
14 said that the -- the -- all of the existing orders shall
15 apply to the MDL direct action cases, we tried to eliminate
16 as much of that language in our August proposed order that
17 was merely duplicative of something that is going to apply
18 to us by default. So we stripped it -- we stripped the
19 proposed order down to only those issues as you said where
20 there's a live dispute, or at least tried to do it.

21 THE COURT: Or something that needs to be
22 addressed, yeah.

23 MR. MITCHELL: Correct. Yes, Your Honor.

24 THE COURT: Okay. Okay. Got it.

25 Mr. Taylor, do you have a different perspective on

1 that?

2 MR. TAYLOR: No, Your Honor. That's defendants'
3 understanding as well.

4 THE COURT: All right. All right. Well, I
5 will -- I will do another compare and contrast before I
6 finalize and make sure I take that into account.

7 All right. Let's move then to the provisions on
8 discovery. And the first in order in which they appear in
9 the case management order or proposed case management order,
10 it looks like the issue of interrogatories comes up first.
11 I had one definitional question before we get into the guts
12 of the parties' dispute, and that is the term "MDL DAP
13 family" appears here, and I didn't know if that term is
14 defined somewhere? You might all think you know what it
15 means. But do we need a definition here for the avoidance
16 of doubt?

17 MR. MITCHELL: I think we had -- I think there is
18 a common understanding. As that term -- I know that that
19 term "family" appears in some of the preexisting orders, and
20 if we did not include a definition of that in here, I think
21 that was probably an oversight. And so if it would be
22 helpful to provide that, I think -- I think we can do that,
23 and I'm fairly confident that we and the defendants can come
24 to some agreement about what that means. But, you know,
25 we're -- to the extent there are multiple corporate entities

1 that really should be treated as one, then we would -- you
2 know, we would have them treated as one, whether we're
3 responding or propounding discovery.

4 THE COURT: I think it would be -- number one, I
5 agree with the premise. Number two, I think it would be
6 helpful to actually have a -- to have a definition, or, if
7 there's a definition in another document that's already on
8 the docket, something that says we're incorporating by
9 reference this -- this definition, just so there isn't any
10 question down the line, because, at the moment, it's not a
11 defined term in this particular document.

12 All right. Let's turn to interrogatories then and
13 let me hear -- Mr. Taylor, let me hear first from you about
14 the defendants' perspective on limits on interrogatories.

15 MR. TAYLOR: Thank you, Your Honor. So, you know,
16 big picture, the MDL DAPs are seeking both to curtail the
17 discovery that they have to provide while at the same time
18 expanding the scope of discovery to which they are entitled.
19 MDL DAPs are seeking to quadruple the amount of
20 interrogatories that they would otherwise be allotted under
21 the pretrial scheduling order and to double the amount of
22 requests for admission. And unlike depositions,
23 interrogatories have a way of getting used -- used up
24 whenever they are on the table. It's much easier to write
25 an interrogatory than to answer one.

1 When the pretrial scheduling order was entered,
2 both the provisions on depositions and on interrogatories
3 and requests for admission applied by its terms to direct
4 action plaintiffs, not to Winn-Dixie and Bi-Lo and Cheney
5 Brothers, but to direct action plaintiffs. And when it was
6 entered, there were already three direct action plaintiffs
7 in the case, and we knew at that time that more were likely
8 on the way. So defendants do not see the justification for
9 upsetting the bargains that were struck in the pretrial
10 scheduling order. Happily, I believe it was entered on
11 stipulation as a result of negotiations, and that involved
12 give and take, and defendants feel like DAPs' proposal
13 somewhat pulls the rug out from under them and is a one-way
14 ratchet, more from defendants, less to defendants, without
15 good justification.

16 If there is actually some need down the road for
17 interrogatories for information that MDL DAPs could not get
18 from the five otherwise allotted to them, in addition to the
19 25 allotted to plaintiffs collectively, let them come back
20 to defendants and, if necessary, to the Court if and when a
21 concrete need arises, rather than, again, putting those on
22 the table now where they will surely be taken advantage of
23 later, real need or not.

24 THE COURT: And this is even though what they are
25 proposing is that the MDL DAPs would jointly serve 20, not

1 that each DAP or each DAP family, but that altogether, they
2 would get to serve another 20 on each defendant family;
3 right?

4 MR. TAYLOR: Correct, Your Honor, because that was
5 the understanding when the pretrial scheduling order was
6 entered also. There was a collective five for direct action
7 plaintiffs collectively in addition to the 25 from all
8 plaintiffs collectively on each defendant family.

9 THE COURT: Okay. All right.

10 Mr. Mitchell, let me hear from you.

11 MR. MITCHELL: Sure. So with respect -- first,
12 very quickly, with respect to interrogatories and RFAs,
13 interrogatories in particular. As you know, I'm sure, under
14 Rule 33, each party typically has 25 interrogatories that it
15 may serve on each other party. So we are talking -- the DAP
16 proposal here is a significant limitation on what the rules
17 provide. Now, I understand, obviously, Mr. Taylor's
18 position about the existing order, but we think that having
19 the DAPs collectively -- and, by the way, with respect to
20 both the discovery limits on interrogatories and RFAs and on
21 depositions, which we'll get to in a moment, those were
22 deals struck, obviously, between the direct action
23 plaintiffs Winn-Dixie and Bi-Lo Holdings who are not part of
24 the MDL but struck those agreements without the
25 participation of any of the MDL DAPs. We could not and did

1 not have any opportunity to participate in those
2 negotiations. So holding us to those limits we think is
3 unfair, inappropriate.

4 But we don't think that collectively permitting
5 the MDL DAPs to have 20 interrogatories is unreasonable
6 given our own cases. Certainly, we will not abuse the
7 process. We are also obligated under the existing order to
8 confer with all other plaintiffs to ensure that any written
9 discovery we propound is not duplicative of other discovery.
10 So we will do and are obligated to do our best to coordinate
11 with the other plaintiffs so as not to propound unreasonable
12 or duplicative discovery.

13 So I will pause there before I turn to the
14 deposition issue. I'm not sure if you wanted me to address
15 that now, but that's one the DAPs feel quite strongly about,
16 and so I would address it next but wanted to pause here for
17 a second.

18 THE COURT: No, I was going to deal with
19 interrogatories and request for admissions and don't intend
20 to skip over depositions. I was just taking things up as
21 they appear in the proposed order. I think you may have
22 briefed them in slightly different order in your joint
23 submission. Okay.

24 So let's turn just to -- to the request for
25 admissions then. I understand the -- I understand the

1 parties' positions and -- on each with regard to the
2 interrogatories and I think requests for admissions.

3 Let me -- let me ask this, Mr. Taylor, on requests
4 for admissions, to what extent does defendants' proposal
5 account for the concern that requests for admission could be
6 highly individualized, in other words, in terms of there
7 could be requests for admissions that are uniquely about the
8 relationship between a particular direct action plaintiff
9 family and that -- and the defendant family, and that those
10 wouldn't be taken account of in the collective wisdom, if
11 you will. How does your -- how does your proposal address
12 that?

13 MR. TAYLOR: Sometimes there are, Your Honor, but
14 there are also requests for admission, of course, that
15 absolutely can be dealt with jointly, requesting admissions
16 of certain allegations in the complaint, for example. I
17 think the response to that is defendants are always willing
18 to meet and confer in good faith. If there are -- you know,
19 first, I think 75 allows -- is a large number that already
20 allows for MDL DAP-specific issues. To the extent there are
21 requests that might be -- the answers to which might be MDL
22 DAP-specific, such as, you know, with respect to
23 jurisdiction or lack of an arbitrability defense, just
24 throwing things out there, again, that would be allowed
25 within the collective response even though each answer would

1 be individual. To the extent certain MDL DAPs have
2 individualized issues, they can carve those up among the 75.
3 But if it's truly impossible and there's a good reason, you
4 know, defendants -- it's not going to be in our interests to
5 look unnecessarily obstreperous before Your Honor and brief
6 something that you are going to order us to do anyway. So
7 we are always open to meet and confer and that's always a
8 possibility.

9 THE COURT: Does anybody know how many of the 75
10 requests for admission have already been served in the
11 preexisting litigation?

12 MR. TAYLOR: I don't believe any have been,
13 Your Honor, but if they would have been, it would have been
14 from class counsel and they -- someone could correct me.
15 But off the top of my head, I don't believe we have requests
16 for admission yet.

17 THE COURT: Mr. Clark. Oops. You were there and
18 then you weren't.

19 MR. CLARK: That's correct. I don't recall that
20 we've served RFAs yet to date.

21 THE COURT: All right. All right. Mr. Mitchell,
22 anything further on RFAs?

23 MR. MITCHELL: No, Your Honor.

24 THE COURT: Okay. All right. So now let's talk
25 about depositions, and I will move to that part of the -- or

1 move back to that part of the briefing. I'll now move back
2 to that part. So, Mr. Mitchell, you said that this is of
3 particular concern to the -- not that anything else isn't of
4 particular concern, but that it sounded like this one has
5 extra emphasis for you all. So tell me about why this is
6 particularly troubling.

7 MR. MITCHELL: Well, thank you, Your Honor. I
8 think -- the issue is very straightforward. I think it's
9 just a question of how many depositions of each MDL DAP the
10 defendants will be permitted to have, and the only argument
11 that the defendants make is that the MDL DAPs should be
12 stuck with what Winn-Dixie and Bi-Lo Holdings -- prior to
13 any of the MDL DAPs filing their cases and the MDL being
14 created -- that we should be stuck with that number, which
15 is five 30(b)(1) depositions and one 30(b)(6) deposition.

16 So for -- under the defendants' proposal, what
17 we're talking about is -- and there are around -- there are
18 currently around 60 DAPs -- 360 depositions, which we think
19 is beyond the pale. In contrast, as I said, we don't think
20 we should be stuck with something we had no opportunity to
21 negotiate.

22 We have proposed two depositions per DAP, one
23 30(b)(1) and one 30(b)(6). In our experience in the
24 *Broilers Chicken* litigation, that is more than sufficient
25 for the defendants to seek and get the discovery that they

1 need from the DAPs. To the extent that they -- defendants
2 in that case felt like they needed additional depositions,
3 my understanding is that those issues were able to be worked
4 out. I have every confidence that we would be able to do
5 that here. But to out of the gate require the DAPs to sit
6 for potentially six depositions, we think is unreasonable.

7 THE COURT: Mr. Taylor, tell me why at this
8 juncture you and -- you anticipate you're likely to need as
9 many as five 30(b)(1) and one 30(b)(6) depositions? In
10 other words, what -- as you're thinking through the course
11 of discovery, what leads you to believe that you will need
12 this many depositions of each MDL DAP family?

13 MR. TAYLOR: We actually agree with the MDL DAPs,
14 Your Honor, that we will likely not need that many
15 depositions in the pretrial phase for each MDL DAP. What we
16 want instead is the ability to take that for the MDL DAPs
17 for which we do need that many depositions, and there will
18 likely be some.

19 Stepping back to first principles a moment, as MDL
20 DAPs are fond of reminding the Court and the defendants,
21 they brought their cases individually. Many of them are
22 likely seeking hundreds of millions of dollars in damages
23 before trebling. They knew when they brought those cases
24 individually that the federal rules provide for ten
25 depositions, not six. Defendants are not seeking ten. But

1 we are seeking the ability, where necessary, for a little
2 symmetry in terms of the record the parties are able to
3 build.

4 Moving to particulars, again, it is absolutely
5 right that in the *Broilers* case, which shares some counsel
6 with defendants' counsel here, we did not take even the
7 allotted two deposition for each MDL DAP. Instead, we look
8 at the documents we have, the personnel at issue, how much
9 those issues overlap in single personnel, and make decisions
10 on that basis, and we will absolutely do the same here.

11 We do not expect to take 360 depositions, but to
12 take an example, MDL DAPs' definition of pork is very broad.
13 The relevant time period is lengthy. And to take DAP Topco
14 for an example, defendants recently agreed to 22 document
15 custodians for Topco while reserving our right to request
16 more depending on what the documents look like. In addition
17 to multiple purchasers at different levels of the
18 organization like most MDL DAPs -- or at least many of them
19 are likely to have, Topco also employs agricultural
20 economists and commodity analysts, various kinds of market
21 analysts that defendants will likely want to depose to
22 substantiate the market factors that affected supply of hogs
23 and/or pork throughout the relevant time period. That's
24 just one example.

25 Given the number of DAPs here, as we've discussed

1 earlier, we are likely to benefit from -- and what you need
2 and what you don't need is always a judgment call, and the
3 rules struck that balance at ten as reasonable. And at a
4 case of this magnitude, defending five, plus a potential
5 30(b)(6), is proportional given MDL DAPs' demand.

6 But we won't know exactly how many we need from
7 exactly which MDL DAP until we see their documents, until we
8 have some interrogatory responses, but what we don't want to
9 do is be stuck with one fact witness, plus a corporate
10 representative, and be at MDL DAPs' mercy with respect to
11 meet and confers and have to come to the Court each time we
12 think we need more than they do. Five is the balance
13 struck, and MDL DAPs has said a few times today that it's
14 not fair for them to be held to the balances struck by prior
15 DAPs. Of course, they are now in the process of striking
16 bargains for later MDL DAPs. That's just the way these
17 cases go, and all parties expressly applied the provisions
18 and limitations in the pretrial scheduling order to direct
19 action plaintiffs as a class, not as any -- you know, the
20 three direct action plaintiffs in the case at that time. So
21 for defendants, at least, that was our expectation.

22 THE COURT: All right. Anything further,
23 Mr. Mitchell? Or, Mr. Ahern, you came on screen. Was there
24 something you wanted to make sure I heard by context as one
25 of the early DAPs in the case?

1 MR. AHERN: Yes, Your Honor -- thank you very much
2 -- as my clients' names have been taken in vain here or been
3 invoked. So, Your Honor, obviously at the time that this --
4 the deposition limit was negotiated, we were the lone
5 private company DAP, and we didn't feel that, given the
6 desire for the parties and the Court to have a fruitful
7 negotiation, that we could throw a roadblock into that being
8 a lone DAP. We certainly did not have any kind of critical
9 mass at that time unlike now.

10 And, of course, as Your Honor knows, we're seeing
11 this play out not only in this case, but we're likely to see
12 it play out in the *Beef* case. And just it's one of those
13 things that just has to be sort of dealt with. And, now,
14 with respect to the number, you know, I would have a hard
15 time coming up with five people for them to be able to
16 depose because of attrition at least in the retail grocery
17 industry, at least with my clients, and so that was
18 something that also came into our thinking on this.

19 But I guess it's my view, Your Honor, and the
20 final point is there's no way we could bind the MDL direct
21 action plaintiffs in what it was that we agreed to. That
22 would just, you know, be unfair. So I guess, Your Honor,
23 it's -- in my view, it's the idea of, well, if, you know,
24 the amount of work will expand to fill the space, and I
25 think the better cause of action is to limit it more and

1 then let the parties meet and confer. I think that they
2 have -- that has worked out in *Broiler Chicken*, I think,
3 fairly well. And so obviously even though we're -- even
4 though we will abide by what we agreed to, I think that
5 somewhere between a two- or a three-deposition limit, which
6 is really what we're going to be talking about with you on
7 Wednesday in *Beef*, will be -- will be something that is more
8 appropriate.

9 THE COURT: All right.

10 MR. MCCAILL: Your Honor, I'm sorry. Can I just
11 weigh in? This is Matt McCahill from Kaplan Fox, and I
12 represent, along with my co-counsel, Topco, which is the
13 entity that Mr. Taylor was referring to. In the *Broiler*
14 *Chicken* case where Topco agreed to a similar number of
15 custodians -- a similarly large number of custodians, they
16 have only taken one 30(b)(1) deposition. They had planned,
17 but then withdrew, a 30(b)(6) notice. So I guess my point
18 is the fact that there's a significant number of custodians
19 for a particular plaintiff doesn't necessarily mean that the
20 defendants are going to be keen to depose more than they
21 feel is necessary, so I just wanted to speak up for my -- on
22 behalf of my client.

23 THE COURT: All right. Ms. Gore, were you wanting
24 to weigh in?

25 MS. GORE: Yes, Your Honor. On behalf of Cheney

1 Brothers, I believe the defendants noted Cheney Brothers as
2 one of the plaintiffs who were present during the
3 negotiations that occurred when Winn-Dixie and Bi-Lo were a
4 part of the negotiations. Just to clarify, Your Honor,
5 Cheney Brothers was not involved in those negotiations
6 during -- during that time. I just wanted to make that
7 clear.

8 THE COURT: All right. All right. Thank you.
9 The record will reflect that.

10 Okay. All right. I -- I'm leaning more toward
11 defendants' position on this, maybe not going with the five
12 plus one. It might be four plus one or something like that,
13 but I am hearing that -- even from Mr. McCahill that the
14 defendants have done as Mr. Taylor indicated they have done,
15 which is not to use them just because they are there, and --
16 but to be able to use them if -- if they seem necessary
17 without having to come back to the Court to ask for more.
18 So I think I'm leaning in that direction, but I will give
19 that a bit more thought before I nail something -- before I
20 nail something down.

21 Let me think if there was anything else on -- oh,
22 for clarity, that includes non-party depositions noticed by
23 a -- by a defendant as well, or is there a separate --

24 UNIDENTIFIED SPEAKER: Yep.

25 THE COURT: Okay. Who was that? Just for the

1 record, who was that that chimed in yep?

2 UNIDENTIFIED SPEAKER: (Inaudible).

3 THE COURT: I'm sorry. I didn't hear.

4 MR. MITCHELL: I think that may have been an
5 inadvertent failure to mute. I could be wrong.

6 THE COURT: Oh, all right. So, Mr. Taylor, is --
7 am I correct in my understanding that that limit includes
8 non-party depositions and not just -- or is that just
9 depositions of -- by the defendants of the direct action
10 plaintiffs?

11 MR. TAYLOR: Correct, Your Honor. It is
12 depositions of a direct action plaintiff family.

13 THE COURT: Is there at least at this point a
14 limit under discussion for a party's ability or a party
15 family's ability to notice up non-party depositions? Is
16 there some aggregate limit or is that unlimited at least as
17 far as this order is concerned?

18 MR. TAYLOR: So far, Your Honor, both under the
19 pretrialing scheduling order and under the MDL DAPs' and
20 defendants' proposed case management order, there is no
21 limit on third-party notices.

22 THE COURT: Okay.

23 MR. TAYLOR: Neither party has squawked so far in
24 the course of noticing those.

25 THE COURT: All right. And I certainly don't

1 intend to engender a dispute where there is none, but I just
2 wanted to be clear. Okay.

3 MR. GANT: Your Honor, this is Scott Gant. May I
4 just follow up on that point?

5 THE COURT: Yes, sir.

6 MR. GANT: It's been my understanding that what
7 all the parties have been proposing vis-a-vis the deposition
8 limit is that whatever limit you decide to set, that it will
9 apply to both current and former employees. And the former
10 employees are technically third parties under the rules; but
11 for purposes of the limits here, as they have been, for
12 example, in the *Broiler Chicken* case, they are treated for
13 counting deposition limits as if they are part of the
14 defendant -- excuse me -- as part of the family of the
15 noticed party, and I --

16 THE COURT: Understood.

17 MR. GANT: -- I don't understand Mr. Taylor to say
18 something different, but I just want to make sure we're not
19 misunderstanding them or you with respect to this, so
20 I'll -- go on.

21 THE COURT: That's a good clarification. I didn't
22 note that the proposed language in the scheduling order, as
23 I recall, was talking about current and former employees,
24 but that's definitely something that needs to be clarified.
25 Mr. Taylor, do you disagree?

1 MR. TAYLOR: No, I do not, Your Honor, with one --
2 with one caveat. The wording under the pretrial scheduling
3 order is "Percipient witnesses shall include corporate
4 plaintiffs' current employees as well as former employees
5 where the corporate plaintiff makes the witness available
6 for deposition." So where their interests are essentially
7 aligned, defendants would agree, but only that far.

8 THE COURT: Okay. And, Mr. Gant, do you take
9 issue with that additional clarification?

10 MR. GANT: Well, I can't take issue with what's
11 written there. Frankly, I didn't remember that. I can
12 think of a situation in *Broilers*, which I know Mr. Taylor is
13 familiar with, where there was a former employee, for
14 example, of Sysco who was currently employed by a defendant
15 and his deposition was taken and the parties agreed that
16 that was counted as a Sysco deposition even though he had
17 his own counsel and did not cooperate with Sysco. I
18 personally don't think that we should treat that as a
19 non-Sysco deposition. If the deposition is supposed to be
20 about the person's experience while employed by Sysco, I
21 would think that that should be counted even though the
22 person isn't quote, unquote, made available. And I'm not
23 sure what "made available" means anyway because you can't
24 compel a former employee to appear. They have to do it
25 voluntarily even if it's pursuant to some kind of separation

1 agreement, so I'm not exactly sure what that language means.
2 But that's my caveat to the language or my interpretation of
3 the language. And if you'd like, Your Honor, we could work
4 on a proposed alternative language that more closely
5 reflects to include the situation I'm describing.

6 THE COURT: Well, certainly if you are not on the
7 same page about how these depositions are going to be
8 counted, it would be a good thing to get on the same page
9 about that, whatever the number is. In terms -- in terms of
10 "making available," my understanding of that -- just sort of
11 my practical understanding of that has always been if the
12 company said, Look, they are a former employee, but, no, you
13 don't have to subpoena them, we will make them available,
14 that's making them available. If the company is saying,
15 I've got no control over them, I -- you know, I'm not going
16 to even try to ask them to come in, you are going to have to
17 subpoena them, then that's different. Now, whether you want
18 to include both of those in the category of, quote, former
19 employees is perhaps something you want to see if you are on
20 the same page about or not.

21 MR. GANT: We will confer on that, Your Honor.
22 And I don't want to -- you have been very generous with your
23 time, and I don't want to prolong the argument, but I did
24 have a few quick points on the number. I understand and
25 respect your provisional view about the number, but if you

1 want to be here 60 more seconds, based on our experience in
2 *Broilers*, I'd welcome it, but obviously I know we've been
3 going long, so...

4 THE COURT: Okay. I will give you 60 more
5 seconds, but I -- my law clerk, and I'm noticing as well,
6 that there's still somebody on the telephone who is not
7 muting. And don't make me come look for you, because my
8 reaction to looking for you when I find you may be to just
9 cut you out of the Zoom meeting, so please double-check your
10 phones and make sure that you are -- that you are muted.

11 All right. Okay. 60 more seconds, Mr. Gant, that
12 was you?

13 MR. GANT: Yes. Thank you, Your Honor. Just as a
14 reminder, in *Broilers* the order provided for depositions
15 between one and two direct action plaintiffs, and that
16 worked well. I believe there were only two direct action
17 plaintiffs with respect to which there was not agreement
18 worked out. So that system worked extremely well. Direct
19 action plaintiffs, of course, want to have some
20 predictability or certainty, and I would respectfully
21 suggest that compromising on something like three or four
22 rather than six is appropriate. It would be double the
23 number in *Broilers* and much more closer to what the
24 defendants are proposing with respect to interrogatories.
25 So if you compare the ratio of what's permitted under the

1 rules if it were an individual case, here, in the
2 interrogatory and the deposition issue, they are being much
3 more ambitious -- they are asking much more of us in
4 depositions than they are willing to give in
5 interrogatories, so I would expect something more
6 commensurate along their lines of three or four. Thank you,
7 Your Honor.

8 THE COURT: All right. Thank you, Mr. Gant.

9 Let's move on then. I think the last question is
10 discovery limits applicable to future DAP cases. Here's --
11 here's what I'm thinking -- and I'm concerned our poor class
12 counsel are wondering if they'll ever get a chance to weigh
13 in in this particular conference. So here's what I'm
14 thinking. I'm -- I'm not comfortable with a -- with
15 defendants' proposal as -- as is, just saying you cannot
16 serve this discovery if you don't get an order finding
17 there's good cause. But I do think that it might make sense
18 to have some requirement that before a new DAP comes in,
19 there needs to be -- they need to review the discovery
20 that's already been taken. They need to meet and confer
21 with the defendants about what additional discovery they
22 think they want to serve, but I -- and that that ought to
23 happen at the very least before discovery is served in -- in
24 earnest.

25 But let me ask, Mr. Mitchell, when you -- when you

1 say you -- the -- the limits that you are negotiating here
2 are intended to apply to future DAPs as well; right?

3 MR. MITCHELL: I believe that's correct,
4 Your Honor.

5 THE COURT: Okay. So the -- so you're not
6 arguing -- in arguing that there should not be something
7 akin to what the defendants are proposing, you're not
8 arguing that every time a new DAP comes in, that the limits
9 be up for -- that we're negotiating here and discussing here
10 and that I'm going to be ruling on here are up for grabs
11 every time a new plaintiff comes in? That's not what you
12 are proposing; right?

13 MR. MITCHELL: That -- that's -- I believe that
14 that's correct, Your Honor. I think our -- I don't -- I
15 don't have any basis, based on my discussions with the other
16 DAPs, that that's -- that's -- anyone has a different view
17 about that.

18 THE COURT: Okay. All right. So, Mr. Taylor,
19 if -- if that's -- if that's the case, and just accepting
20 that as a given, then if there -- whatever the limits are in
21 this order, are you -- are you just looking for something
22 that gives you confidence that a new DAP can't come in and
23 serve discovery that goes beyond the limits set by this
24 order without a showing of good cause, or are you looking
25 for something different from that?

1 MR. TAYLOR: It's a little more than that,
2 Your Honor. It's also, for example, a request for
3 production. I believe what sometimes happened in the
4 *Broilers* action is we would get -- late-filed DAPs would say
5 we need a new custodian, you know, and we want all of these
6 documents as well. And so we would be in the position we
7 were in at the last status conference where now we're
8 arguing over search terms again late in the game when
9 depositions have already been taken, we're getting ready for
10 summary judgment or we're dealing with experts, and now we
11 have to deal with the new round of custodian negotiations
12 and document production, get our review crew back.
13 Practically speaking, I think all of the sophisticated pork
14 producers are on notice of their claims, and we don't want
15 them to upset the course of this litigation by sitting on
16 their rights.

17 All right. Mr. Mitchell, do you want to comment
18 further?

19 MR. MITCHELL: No, no. Nothing else at this time,
20 Your Honor.

21 THE COURT: All right. I will give that some
22 additional thought then. And my pen just ran out of ink.
23 Just a moment. There we go.

24 All right. I think that covers the issues that
25 you all raised. There is other language that is typically a

1 part of my scheduling orders. It is a part of the existing
2 scheduling order. I will either make sure it's clear that
3 those other pieces apply here too, for example, my informal
4 dispute resolution process and that kind of thing, so I will
5 make sure that those are at least incorporated by reference.
6 Another example is my expectations if documents get filed
7 under seal, that kind of thing. But, otherwise, I'll, as I
8 say, do another compare and contrast with what was in the
9 August version that's not in this one; and if I decide to
10 add something back in, it will be because I've concluded it
11 wasn't clearly covered before.

12 Still looking for that meet and confer letter by
13 Friday. If you get to Friday and you're still meeting and
14 conferring in a productive way and you need until Monday to
15 land that plane, just drop a note to chambers. Let me know
16 you need another day to really nail it down, but don't
17 just -- don't just let Friday come and go without letting me
18 know that.

19 Last call for anything we haven't addressed that
20 you felt we needed to address on the scheduling order?
21 Mr. Mitchell?

22 MR. MITCHELL: I do not, Your Honor. Thank you.

23 THE COURT: Okay. Mr. Taylor?

24 MR. TAYLOR: Not substantively, Your Honor, but
25 just an update. Judge Tunheim did reach out to the parties

1 last week and request a conference with us this coming
2 Friday, and he had originally requested a report on case
3 management issues in the MDL by Wednesday. We talked to
4 Ms. Arent, his courtroom deputy, this morning and let him
5 know about the joint update letter and the disputes and that
6 we would be likely addressing them with you today. And she
7 said thank you very much for letting us know, but we just
8 wanted to let you know.

9 THE COURT: All right. So is -- and I didn't
10 realize that but thank you for letting me know. So that --
11 so that conference is going to happen on Friday, and she
12 will look at the joint update letter by way of update, or
13 were you going to be preparing an updated update?

14 MR. TAYLOR: She told us we did not need to
15 prepare an updated update and that she would either send us
16 an invite or a cancellation depending on how today went and
17 likely his conversations with you in the interim.

18 THE COURT: I will -- since there are a couple of
19 things I need to chat with him about anyway, I will reach
20 out to her and make sure that you get clear direction one
21 way or another on that. But thank you very much on that.

22 All right. Let's give our court reporter a break.
23 Ms. Drost, what do you need? Would ten minutes work?

24 THE COURT REPORTER: (Nods head.)

25 THE COURT: All right. We're going to take a

1 ten-minute break. My clock says it's 2:54. We will come
2 back on at five minutes after the hour and pick up the rest
3 of the agenda.

4 (Recess taken at 2:54 p.m.)

5 * * * * *

6 (3:05 p.m.)

7 **IN OPEN COURT**

8
9 THE COURT: All right. Well, let's pick back up
10 again, so anyone who wants to be a part of the next phase of
11 our discussion, why don't you go ahead and turn your audio
12 [sic] on but leave your microphones off. Now I'm just
13 seeing Mr. Pouya.

14 MR. POUYA: I was just confirming that I'm present
15 when you get back on after a break. I think there's a
16 number of people that are going to be speaking in the next
17 phase.

18 THE COURT: I think that's true. All right.
19 Well, I will go ahead and start the recording again. And we
20 are back on the record after a short break with our case
21 management conference in the In Re: Pork Antitrust
22 Litigation. I think we have -- not only think, I know that
23 we have concluded our conversation about the scheduling
24 order in the -- involving the direct action plaintiffs and
25 we are ready to turn to the rest of the conference.

1 So Item Number 2 on the agenda is broadly titled
2 as Status of Discovery. There are a number of topics there.
3 I have read the parties' joint update, and so I don't need
4 you necessarily to repeat what was in the update. The
5 purpose of our conversation going forward is going to be if
6 there are things that you want to elaborate on or if there
7 are disputes bubbling up where we ought to be talking
8 about -- more concretely about whether and, if so, when they
9 may be ready for motion practice.

10 So I am seeing on my screen Mr. Pouya, Mr. Bourne,
11 Mr. McCahill, Mr. Taylor, and Ms. Scarlett, and Mr. Robison,
12 or he's about to show up. There he is. All right. So I am
13 going to assume that these are the faces I'm going to be
14 hearing from over the next few minutes.

15 So I'm just going to go through the list of
16 subtopics under Status of Discovery, and you can let me know
17 if there's something beyond what's in the update letter that
18 you think we ought to spend some time talking about this
19 afternoon. And for the court reporter's benefit, even
20 though your names are on your screens, if you could say who
21 you are when you start to speak, that can sometimes be a
22 little extra help for her.

23 So let's start with the issue of depositions.
24 You've indicated that you'll be prepared to discuss the
25 progress and status of depositions. And I have reviewed the

1 couple of paragraphs in the joint update on that topic. So
2 who would like to lead off in telling me any more about
3 where you are with depositions? Mr. Bourne. All right.

4 MR. BOURNE: Good afternoon, Your Honor, Joe
5 Bourne, and I represent the direct purchaser plaintiffs. We
6 put it in our update letter so I'm not sure there's a whole
7 lot more flavor to add here, but I thought Your Honor would
8 be pleased to hear that the parties have been working
9 together cooperatively to schedule and take all the
10 depositions that have occurred so far in this case. There
11 haven't really been -- you know, there have been minor
12 hiccups related to technology and things like that, but
13 everything so far has been worked through and there are no
14 real concerning issues at this point for the Court.

15 THE COURT: Excellent. That is good to hear.
16 Anybody want to add any gloss to that, or should we just let
17 that positive report stand and shine on its own and move to
18 the next topic?

19 No. All right. We will leave it at that. Thank
20 you. And thank you for the work that -- and the
21 collaboration that necessarily underlies that report.

22 Let's move on to structured data and data
23 questions. Again, I've got the parties' update which kind
24 of boiled down to there have been lots of questions. The
25 defendants have been fielding those questions and believe

1 that they have answered the questions so far, but the
2 plaintiffs aren't yet ready to say that they have no further
3 questions. So beyond that takeaway, who would like to tell
4 me a little more about where that all stands? Ms. Scarlett?

5 MS. SCARLETT: Your Honor, I think you've
6 summarized it correctly. As you know, these data -- the
7 data in these cases is incredibly complex. There's a lot of
8 parties that are producing them. Experts are working hard
9 behind the scenes looking at the data, cleaning it, and
10 sending questions over across to defendants and we're
11 following up. Certainly the process is not done. Thus far
12 it's been very cooperative. We are following up with some
13 number of defendants and outstanding questions, but we hope
14 to have that wrapped up pretty quickly.

15 THE COURT: All right. Excellent. Anybody want
16 to add anything to that?

17 MR. RASHID: Good afternoon, Your Honor, Sami
18 Rashid from JBS. I just wanted to provide an update on the
19 footnote on the bottom of page 2 with respect to JBS's
20 efforts to restore backup tape. We recently received an
21 update from our client that there have been some issues with
22 the restoration of the backup tape. We don't have a clear
23 timeframe on the resolution of those issues, but we plan to
24 keep the plaintiffs updated. But since it was in the
25 letter, I thought I'd just mention that now.

1 THE COURT: So it sounds like the difficult -- as
2 of the letter, you said, absent any issues, this is when we
3 anticipate producing it.

4 MR. RASHID: Yes.

5 THE COURT: But what you are saying is some issues
6 have arisen since --

7 MR. RASHID: That's correct.

8 THE COURT: Got it. All right.

9 MR. MCCAHERILL: And, Your Honor, this is Matt
10 McCahill from the direct action plaintiffs. Just to follow
11 up on what Mr. Rashid said, we've been working, in
12 particular, with JBS to get updates on their structured data
13 productions. I just got an e-mail from Sami earlier today
14 about the status of that, so those discussions continue.
15 They are collaborative, and that's all. That's all I have
16 to say for the DAPs' perspective.

17 THE COURT: All right. Thank you, Mr. McCahill.

18 So, Mr. Rashid, you anticipate what I was going to
19 tell you anyway, which is keep the plaintiffs posted as to
20 your clients' efforts to get those -- to get that -- those
21 backup tapes -- is it one or more backup tapes?

22 MR. RASHID: I believe it's just one, but I'm not
23 going to stand by that with 100 percent certainty.

24 THE COURT: All right. All right. Keep them
25 posted on how the efforts are progressing to get that

1 restored.

2 MR. RASHID: We will. Thank you, Your Honor.

3 THE COURT: Moving on then to validation, and
4 you -- again, I reviewed the update, and you have taken --
5 taken away the right -- take away from the conversation we
6 had on validation previously and it looks like are exploring
7 with each other whether there are some concrete reasons to
8 need to bring validation issues to me. Is there an update
9 since the letter on where those conversations stand, and, in
10 particular, are there any that look like they may be headed
11 in -- in my direction? Who wants to address that?

12 MR. BOURNE: Your Honor, Joe Bourne here again.
13 Since the time the parties submitted the letter, some of the
14 defendants have provided additional information or answers
15 to questions that we had posed. So that's the new
16 information piece of it. The parties are continuing to meet
17 and confer.

18 Generally, there are sort of two camps of what the
19 defendants did for a search methodology. Some of them used
20 a Technology Assisted Review or TAR process, some of them
21 used search terms and then reviewed those -- all the hits
22 manually with humans rather than utilizing technology. At
23 this point, it's still hard to say whether there will be any
24 disputes about that process or not.

25 The plaintiffs intend to -- some of the defendants

1 have provided, you know, everything that we've asked for.
2 Some of them are still doing a TAR validation process, and
3 the plaintiffs intend to continue to meet and confer to make
4 sure that the TAR validation is appropriate and will also be
5 conferring further with the defendants that utilize search
6 terms and human reviewers to discuss whether there's an
7 appropriate type of validation that could occur there. At
8 this point, I don't think we can say that there will or
9 won't be a dispute ripe for the Court.

10 THE COURT: All right. Do you have a sense of
11 when you will know, in other words, by this time next month
12 or whatever that you will -- you expect to know whether
13 there either will or won't be -- will or won't need to be
14 elevated to -- to resolution by me?

15 MR. BOURNE: From the plaintiffs' perspective,
16 it's possible that by this time next month we would know
17 whether there's going to be any kind of dispute related to
18 the human review of search terms. It's possible, but harder
19 to predict, the same regarding TAR validation because many
20 of the TAR validation processes by the defendants are still
21 in progress. And my understanding from defense counsel, for
22 at least some of them, is that their production of
23 additional documents in response to the DAPs' requests could
24 require redoing or supplementing that TAR validation
25 process, and it's just hard to know exactly how long that

1 will take.

2 THE COURT: All right. All right.

3 Anybody for the defendants want to weigh in on
4 this particular issue?

5 MR. TAYLOR: I don't believe so, Your Honor.

6 THE COURT: All right. Thank you, Mr. Taylor.

7 Let's then turn to the defendants' responses to
8 the MDL DAPs' first request for production of documents and
9 the discussions relating to that. Who would like to lead
10 off on behalf of the DAPs?

11 MR. MCCAILL: Your Honor, this is Matt McCahill
12 from Kaplan Fox for the MDL DAPs. We don't -- as you can
13 see from our update letter filed on the 24th, we were able
14 to come to a joint statement with the defendants. I'm not
15 aware of any updates in that -- for that specific item that
16 have arisen since -- since the submission of the letter.

17 THE COURT: Okay. Do you have -- let me ask kind
18 of the same question I asked on the last topic, which is do
19 you have a sense about when you will know whether there's
20 something that's going to need to come to me either through
21 an IDR or through motion practice?

22 MR. MCCAILL: I think from the MDL DAPs'
23 perspective, I think if there is going to be issues, it will
24 be sometime in the next few weeks, it will be relatively
25 soon, because the meet and confer process is ongoing as the

1 letter -- as the update letter states. That's the best I
2 can say at this point.

3 THE COURT: All right. All right. Thank you.
4 Mr. Taylor or anyone else want to address that issue for the
5 defendants?

6 MR. TAYLOR: Your Honor, I don't believe
7 defendants have anything to add to the joint statement or
8 Mr. McCahill's statement. We will continue to take MDL
9 DAPs' questions as they come, so we don't have any gloss on
10 when disputes could arise.

11 THE COURT: Okay. Then let's move to the next
12 topic, which is the plaintiffs' responses to defendants'
13 interrogatories. And here there was an issue raised with
14 regard to a particular interrogatory that was directed to
15 the class plaintiffs. I don't know if there's a similar
16 interrogatory out there with regard to the direct action
17 plaintiffs or not, but understanding that you are still
18 meeting and conferring and aren't submitting it for
19 resolution, was that something that you wanted to spend some
20 time talking about this afternoon, or was that just a
21 placeholder so I know that it's out there?

22 (Overlapping conversation.)

23 THE COURT: I'm sorry, Mr. Pouya.

24 MR. POUYA: Yeah, this is Bobby Pouya for the
25 class plaintiffs. I believe there's no particular update

1 other than we received a letter on January 27th from the
2 defendants detailing their position regarding this issue.
3 The classes are considering it. We've agreed to meet and
4 confer globally, and we will respond to the letter and let
5 the defendants know whether we're willing to amend or
6 supplement our responses this week.

7 THE COURT: Okay. Just so I understand what the
8 reach of that particular interrogatory is -- and I don't
9 know which of the defendants' counsel would be in a position
10 to address this -- but is that an interrogatory that was
11 directed to the direct action plaintiffs as well or is it
12 specific to the class context?

13 MR. SMITH: This is Chris Smith. I can speak. I
14 think the focus of the dispute right now is with the class
15 plaintiffs. You know, I think the issue is one that is, you
16 know, potentially broader. You know, again, in our summary
17 we're focusing on, you know, witnesses and facts learned.

18 There is one piece I would put to this and one of
19 the reasons we wanted to flag it. I know there are some
20 upcoming depositions. I think there's a JBS deposition on
21 February 17th, and our hope is that we can have this
22 resolved in advance of those so we have some direction on
23 the legal issues. Even though this is focused on the
24 interrogatories, I think it could impact other aspects of
25 the discovery, so that's why we wanted to flag it for the

1 Court. And, again, we are in the middle -- we are meeting
2 and conferring, we are working through it, and hopefully we
3 can resolve it.

4 THE COURT: All right. I mean, if it does have
5 implications for the deposition on the 17th, obviously, it
6 doesn't allow much time to get it to me if you can't get it
7 sorted out on your own. So ideally you'll get it sorted out
8 on your own, or it won't have any implications for the
9 deposition on the 17th, but -- so stay on top of that. And
10 if it -- if it looks like it's going to turn into a
11 rate-limiting step, then let me know as soon as you can so
12 we can figure out how to address it.

13 MR. SMITH: Absolutely. Thank you, Your Honor.

14 THE COURT: Anything else on that particular
15 topic?

16 All right. There was one other thing that --
17 again, that we just sort of flagged with regard to
18 interrogatories that you're continuing to meet and confer
19 about and that is some of defendants' interrogatories
20 directed to class plaintiffs that the class plaintiffs are
21 viewing as contention interrogatories, and contention
22 interrogatories that are perhaps premature in the -- in the
23 journey of the litigation. So anything -- other than that
24 you were continuing to meet and confer and, therefore,
25 presumably, nobody has declared impasse, is there anything

1 more you want me to understand about that particular
2 dispute?

3 MR. SMITH: I can say, again, other than we're
4 continuing to meet and confer, I think that's just where we
5 are for now.

6 THE COURT: And that was Mr. Smith; right?

7 MR. SMITH: Sorry, Your Honor. I should have
8 introduced myself.

9 THE COURT: All right. Mr. Pouya, you look like
10 perhaps you wanted to get in a word as well.

11 MR. POUYA: No, I would agree with that. We're
12 continuing to meet and confer.

13 THE COURT: All right. Okay. I think then the
14 next topic takes us to the document productions by the MDL
15 DAPs, so these -- as I understand it, this is defendants'
16 requests for structured data and document productions that
17 are made to the MDL DAPs and that the MDL DAPs are in the
18 process of working on. So who wants to tell me how that's
19 going from the defendants' perspective?

20 MR. ROBISON: Your Honor, Brian Robison here for
21 Smithfield. I can address this. Your Honor, this -- this
22 topic really starts with the parties' proposed CMO that was
23 filed on December 10th. That's ECF 1046-1. We talked about
24 that a little bit earlier when we were talking about the
25 consolidation issues.

1 In a footnote in that proposed CMO, the defendants
2 and the MDL DAPs at that time agreed that today, January 31
3 of 2022, would be the date for the DAPs to substantially
4 complete their document and data productions. And leading
5 up to this conference, we reached out to the 27 DAPs that we
6 think are covered by that footnote just to check on the
7 status of document productions. A couple of the 27 DAPs had
8 made some document productions but the others have not. So
9 we reached out just to get a status report from each of
10 them.

11 Of the 27, we've heard from 24. And I'm -- I can
12 summarize the 24 responses this way. Mostly good news for
13 Your Honor. We have heard from 10 of the DAPs that their
14 productions are already substantially complete or they will
15 be substantially complete today. There were four additional
16 DAPs that asked for an extension to February 17, and the
17 defendants agreed to that. And then there was one other
18 DAP, Cheney Brothers, that asked for an extension until
19 March 2nd, and we agreed to that. So 15 of the 27 are on
20 track to hit the deadline today or on track to hit an agreed
21 extended deadline in the next few weeks, so that's the good
22 news.

23 THE COURT: Got it. Okay. Okay. Yes. Go ahead.

24 MR. ROBISON: Now, for the remaining 12, they kind
25 of fit into three categories. The first is a category of

1 four that say that they could substantially complete their
2 productions within two weeks of reaching final agreement on
3 document custodians, and we have made substantial progress
4 with three of those four. We have not made much progress on
5 the last one. We're going to continue trying to meet and
6 confer to get the information that we think we need to reach
7 agreement on the proper custodians for that one last DAP.
8 On the other three, we think we're really close to reaching
9 agreement, and so it looks like for this group of four,
10 we'll have substantial completion at least in February
11 sometime.

12 There's another group of five, and this group, in
13 our view, is a little more vague. They have told us that
14 they anticipate being substantially complete sometime in the
15 next few weeks. So we're going to continue meeting and
16 conferring with them. We would like to pin down a more
17 definite date with this group. That didn't give us much
18 comfort. So we will continue talking to them and again
19 hopefully reach agreement with them on a date certain when
20 they will substantially complete their document productions.

21 And then, finally, Your Honor, there are three
22 DAPs that have not responded to our recent request for
23 updates, so we are uncertain on when they will substantially
24 complete their document productions, so I'm not sure what to
25 tell you there about status or whether we may have a dispute

1 to bring to you. But the goal here is just to keep things
2 on track with the current schedule so that we get the
3 documents that we think we need in order to take the
4 depositions we think we need to take during the fact
5 discovery period.

6 THE COURT: Yeah. All right. Who would like to
7 address that for the DAPs? Mr. McCahill, is that you?

8 MR. MCCAILL: Yeah, this is Matt McCahill for the
9 MDL DAPs. So Mr. Robison's numbers, I generally agree with
10 them in terms of, again, the cataloging of the DAPs into
11 various categories based on what we either agreed to do or
12 have told defendants we will be anticipating substantial
13 completion of documents by one or more dates.

14 In terms of the -- those custodians -- or those
15 MDL DAPs who -- for whom we're finalized on custodians, some
16 of those are my clients. Mr. Robison is correct. We're
17 trying to get that sorted out as soon as we can.

18 In terms of -- my understanding in terms of at
19 least four other DAPs -- I'm sorry -- at least two other
20 DAPs is that the defendant -- they have -- they are awaiting
21 responses from the defendants as to custodian proposals and
22 were e-mailed -- counsel for those particular DAPs e-mailed
23 the defendants last week seeking follow up, and there was
24 no -- they have yet to receive any follow up with respect to
25 their custodian proposals.

1 THE COURT: Let's -- let me just hold you right
2 there then. Is that -- thinking about the different buckets
3 that Mr. Robison described, are those two that are waiting
4 for defendants to get back to them about their proposal with
5 regard to custodians among the three who haven't responded
6 yet or among the five who said that they'll be substantially
7 complete within the next few weeks or among the four whose
8 substantial completion date will be within two weeks of
9 reaching agreement on custodians?

10 MR. MCCAILL: As far as I'm aware, it's neither.
11 In terms of the four that are going to substantially
12 complete following agreement on custodians, these are --
13 these -- the two that I'm referring to I don't believe fall
14 into any of those particular categories, so maybe there's a
15 disconnect between what Brian -- how we're describing the
16 negotiations. And I know that there are, on the line, DAP
17 counsel for most, if not all, of the DAPs on Mr. Robison's
18 list of 27 DAPs.

19 THE COURT: Is somebody wanting to weigh in on the
20 telephone? Hold on a second. No. Maybe it was just
21 somebody wasn't muted.

22 The main thing I'm trying to make sure of is that
23 Mr. Robison or his colleagues on the defense side aren't
24 sitting and thinking, well, the ball is in the -- in one of
25 the DAP's court to get back to them with a substantial

1 completion date while the thought level over that DAP's head
2 is I'm waiting for Mr. Robison or one of the defense lawyers
3 to get back to me about custodians.

4 MR. MCCAILL: Go ahead, Brian, if you want to.

5 MR. ROBISON: Your Honor, I completely agree with
6 you, and I think, Mr. McCahill, we need to make sure we're
7 all on the same page. You know, after this hearing, I could
8 e-mail him the four names that I have in my bucket that I'm
9 calling the bucket that will complete within two weeks of
10 reaching agreement on custodians. And like I said, I think
11 three of the four in that bucket, the parties have made
12 substantial progress, and it may be that my list is
13 overlapping with his list and we just need to compare names.

14 MR. MCCAILL: Yeah, I think that's probably the
15 best thing to do. I will say I just want to note for the
16 Court that, you know, there are DAPs who have filed
17 relatively recently who were just served with defendants'
18 RFPs and interrogatories, and they are in the process of
19 responding to those, and they are soon going to be serving
20 their initial disclosures as contemplated by the document
21 that Mr. Robison referred to, Document 1046-1, the
22 December 10th filing, pursuant to the schedule that's
23 outlined there -- the proposed schedule that's outlined
24 there. I just wanted to note that. I had been asked to
25 raise that just so it's clear that there are DAPs who are

1 not -- who were recently filed, recently transferred by the
2 MDL who are not subject -- who are not included in any of
3 the 27 that Mr. Robison is referring to and who are
4 proceeding on a schedule that is, at this point, you know,
5 proposed that's outlined in the December 10th, 2021, joint
6 filing.

7 THE COURT: Right. And that's the -- basically
8 the column headed "Deadline for New MDL DAPs"; right?

9 MR. MCCAILL: You're referring to 1046-1? Yes,
10 correct.

11 THE COURT: Yes, yes. Okay. Okay. So I think,
12 Mr. Robison, maybe you and Mr. McCahill can chat afterward
13 either by phone or by e-mail, and, as you indicate,
14 Mr. Robison, you're interested in trying to get a somewhat
15 clearer sense of when substantial completion is going to
16 happen for the five that have said sometime in the next few
17 weeks and figure out whether there's anything they are
18 waiting for from you to nail that down and then figure out
19 why the three who haven't responded haven't responded and
20 whether it's because one or more of them thinks they are
21 waiting for something from one of the defendants before they
22 can respond. All right.

23 MR. ROBISON: Yes, Your Honor. Those two buckets
24 are the biggest concern on our side, the five that have not
25 yet pinned down a date, and then the three that as far as we

1 can tell, have not told us anything in the last couple
2 weeks. So I will work with Mr. McCahill to put these -- to
3 put names in each of these buckets, and then we can
4 hopefully pin -- pin some of these additional questions
5 down.

6 THE COURT: All right.

7 MR. MCCAILL: That's right. And, Brian, we will
8 confer after this, make sure we're not missing each other
9 anymore. It sounds like that's what might be happening, but
10 we are committed to resolving and getting this -- getting
11 Mr. Robison's concerns addressed.

12 THE COURT: All right. Thank you, Mr. McCahill
13 and Mr. Robison.

14 Let's move on then to production of the direct
15 purchaser plaintiffs' class member purchase information,
16 which is a request that seems to have arisen primarily out
17 of the Smithfield and JBS settlements. Who wants to address
18 the status of that?

19 MR. POUYA: Thank you, Your Honor. This is Bobby
20 Pouya on behalf of the direct purchaser plaintiffs. So as
21 indicated in the papers, the definition of the approved JBS
22 and Smithfield settlements, the definition of "pork" is
23 broader than the litigation class definition. So we've
24 requested that the non-settling defendants produce
25 additional information to help us administer the

1 settlements, send out claim forms to the class members so we
2 can pay out the monies that have been approved from those
3 settlements.

4 I am happy to report we've reached an agreement
5 with three of the non-settling defendants. Clemens,
6 Triumph, and Seaboard have confirmed that they either have
7 already produced or will produce this information. We will
8 continue to try and reach a resolution with the other two
9 non-settling defendants, which is Hormel and Tyson. We
10 believe we can do that in the next week or so. And if we're
11 not able to, I think as part of our proposal for the
12 dissemination of the notice and claims process, we can
13 present any sort of additional request for that information
14 and have the Court determine what, if any, additional
15 information those remaining non-settling defendants should
16 provide for those purchases that fall within the class
17 definition.

18 THE COURT: All right. Now, in your letter, you
19 indicated that you -- or at least suggested that you would
20 present the issue to the Court as part of your motion for
21 approval of the settlement class claims distribution
22 process. So I didn't know if you anticipated that was an
23 issue that might go to Judge Tunheim, and, if so, maybe I
24 should give him a heads up about that, or an issue that you
25 anticipated presenting to me sort of contemporaneously with

1 these pieces going to Judge Tunheim?

2 MR. POUYA: So I think to the extent that the
3 issue exists, it would be part of the motion for the claims
4 process. And I think you're correct that it would be in
5 front of Judge Tunheim who's approved the notices and the
6 settlements.

7 THE COURT: Got it. All right. Thank you.
8 Anything else from the defense perspective on that issue, or
9 does that fairly state how things --

10 MR. COLEMAN: Yes, Your Honor. It's Craig Coleman
11 from Faegre for Hormel. I can speak to some extent on
12 behalf of all defendants, but as Mr. Pouya previewed, I
13 think the burden of this request falls differently on
14 different defendants, and so we may be differently aligned.

15 For Hormel Foods -- well, really for all
16 defendants, I think I can say with confidence that the Court
17 has had some visibility to the substantial efforts that have
18 been made to produce structured data in the litigation and,
19 in particular, sales data. The Court will recall there was
20 quite a bit of negotiation about the scope and the timing of
21 structured data, and it really was a massive undertaking to
22 comply with that.

23 I'm pleased that -- I think I can speak for
24 everybody in the courtroom, including Your Honor -- that we
25 were able to do that and comply with -- abide by the

1 agreements that we reached and comply with the plaintiffs'
2 request for accelerated production. We were able to do all
3 that without the Court's involvement.

4 So at this stage, the request for additional sales
5 data arises in connection with the direct purchaser
6 plaintiffs' request for additional information to administer
7 their settlements with JBS and Smithfield. And for Hormel
8 Foods, in particular, this does create some really serious
9 concerns that we've been trying to address with the DPPs.

10 As mentioned, I think there is some variation in
11 terms of the burden of what the plaintiffs are seeking for
12 each defendant. But for my client, you know, based on what
13 we've heard from the DPPs and what we've tried to
14 communicate to them, it would be massive. And, in fact,
15 responding to their requests, as we understand it, would be
16 at least as burdensome and likely more burdensome than the
17 original production of structured sales data.

18 So Mr. Pouya is correct, obviously we're hopeful
19 to reach an agreement. We'd like to avoid having a dispute,
20 you know, teed up for the Court. I don't know whether we're
21 going to get there. And it is important to us. The burden
22 that we're talking about is massive. We also think there is
23 an important legal principle in play, that we are not aware
24 of a legal basis for plaintiffs to be demanding that
25 non-settling parties help to administer a class settlement

1 with other defendants. So we're not a party to the
2 settlement, and, effectively, what the request would involve
3 is Hormel business people undertaking significant efforts to
4 generate reports and data for use to -- for the plaintiffs'
5 use in administering the settlement. That's a problem for
6 us potentially if we can't get it resolved, and so it will
7 be important for us to have an opportunity for that dispute
8 to be teed up in front of the Court likely through formal
9 motion practice in one form or another. We would understand
10 that we would need to submit briefs and declarations to
11 substantiate the burden and work through the legal issues
12 for the Court.

13 THE COURT: Uh-huh. Uh-huh. All right. All
14 right. Thank you. That's helpful context, although it
15 sounds like it may not ultimately be something that comes to
16 me for resolution. But, Mr. Pouya, anything further on
17 that?

18 MR. POUYA: No, other than I think -- I understand
19 where Mr. Coleman is coming from. I think we can work
20 together to find a resolution like we have with the other
21 defendants, and I am hopeful we can do so. We're still
22 willing to engage in the process. We're mindful of some of
23 the burdens. But it is obviously important to have this
24 information to make sure that the class members for the
25 settlements that have been approved are able to get their

1 portion of those funds, so we believe it's important and
2 we'll continue to engage to see if we can come to a
3 resolution without Court intervention.

4 THE COURT: All right. All right. Thank you,
5 Mr. Pouya.

6 I think then that that covers everything except
7 your very polite nudge about the -- about the Hormel order.
8 And in answer to your question is there anything more I need
9 from you, no, it is on me. And, actually, I have a draft.
10 It is my plan to get that order out by the end of this week.
11 So you've been waiting longer than you should have for that.
12 As I say, that's on me, but it wasn't for lack of brief and
13 argument. So I have that draft on my desk and you should
14 have it by the end of the week.

15 Dates for future case management conferences,
16 you've suggested every couple of months, and that sounds
17 about right to me as well, which means we will be looking
18 for a date toward the end of March or very early April,
19 unless you tell me that there -- that I misunderstood your
20 suggested timeframe.

21 MS. VAN ENGELLEN: Good afternoon, Your Honor.
22 Breanna Van Engelen for the consumer and direct purchaser
23 plaintiffs. We did suggest every two months, and the end of
24 March or beginning of April would work for us.

25 THE COURT: All right. Is -- are there any dates

1 at this point -- well, no. There's so many people involved
2 that that -- that way lies chaos if I ask if there are any
3 particular dates that will work. I know we're right in the
4 middle of holiday and spring break season, but I'm just
5 going to have to pick something that works on my calendar
6 and hope that you all can make it work for -- for yours.

7 So one of the things I'll do, as soon as we're off
8 this call, is get with my assistant and pick -- in fact,
9 we'll probably go ahead and at least schedule the next
10 couple, so pick a date at the end of March, pick another
11 date at the end of May, not Memorial Day, and at least give
12 you a couple of these conferences on your calendar.

13 Anything else -- I'm sorry. Okay. Anything else
14 that we ought to address?

15 Mr. Finley, I see you. Is there something we
16 haven't covered that we ought to?

17 MR. FINLEY: Yes, Your Honor. My group commercial
18 and direct plaintiffs would just note in passing that in
19 relation to guidance provided by Your Honor, at Docket 1103,
20 a joint update letter in regard to Pacific Agri-Products'
21 proposed amendments to the protective order has been filed.
22 From my plaintiffs groups' perspective, that process has
23 been completed. However, we are ready and willing to
24 provide formal or any supplemental briefing that Your Honor
25 may desire.

1 THE COURT: Okay. The -- yes. And what I --
2 because I issued or finalized a protective order on that. I
3 wasn't sure if it's already hit the docket or not, but I
4 finalized the amended protective order and a memorandum
5 explaining my -- my reasoning earlier today. And so that
6 should -- if it hasn't been docketed, it will be docketed
7 before the end of the afternoon. So I think we should be
8 set on that.

9 MR. FINLEY: Thank you, Your Honor.

10 THE COURT: All right. Ms. Van Engelen, anything
11 further?

12 MS. VAN ENGELLEN: Nothing further from us. Thank
13 you.

14 THE COURT: All right. Last call?

15 All right. Well, thank you all. I appreciate
16 both your patience and the hard work that went into all of
17 the progress that you have reported in your updates, so I've
18 identified a letter I'm going to look for from -- on the
19 DPP -- or the DAP side of things at the end of this week,
20 and I will also issue an order with new dates for the next
21 couple of case management conferences shortly. So thank you
22 all, and have a good rest of your week.

23 MR. MCCAHERILL: Thank you, Your Honor.

24 (Court adjourned at 3:45 p.m.)

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3 I, Erin D. Drost, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter to the best of my ability.
6

7 Certified by: s/ Erin D. Drost

8 Erin D. Drost, RMR-CRR
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